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AGENDA ITEM
For Meeting of: 10-31-02

SUBMITTED LATE

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith RCS
Acting Associate General Counsel

Mai T. Dinh MTD
Acting Assistant General Counsel

J. Duane Pugh JDP
Acting Special Assistant General Counsel

Michael G. Marinelli
Attorney

Dawn M. Odrowski
Attorney

Anne A. Weissenborn AAW
Senior Attorney

SUBJECT: Draft Final Rules and Explanation and Justification for Contribution Limitations And Prohibitions

On August 22, 2002, the Commission published a Notice of Proposed Rulemaking (NPRM) entitled "Contribution Limitations and Prohibitions." See 67 Fed. Register 54,366. The Commission decided not to hold a public hearing on this rulemaking. See (http://www.fec.gov/press/20021002cancel.html) and 67 Fed. Register 62,4404(October 7, 2002).

After reviewing the written comments to the NPRM and discussing these issues with the Regulations Committee, the Office of the General Counsel has prepared for Commission's consideration the attached draft Final Rules and the draft Explanation and Justification addressing contribution limitations and prohibitions set forth in the Federal Election Campaign Act of 1971 as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"). These rules increase the limits on contributions made by individuals and political committees; index certain contribution limits for inflation; prohibit contributions by minors to candidates, authorized committees and committees of political parties and donations by minors to committees of political parties; and prohibit contributions, donations, expenditures, independent expenditures and disbursements by foreign nationals. These rules also revise the Commission's rules for designating contributions to particular elections and attributing contributions to particular donors. Under § 402 of BCRA, the rules must be promulgated no later than December 22, 2002.

The Commission is scheduled to discuss this draft of the final rules on Thursday, October 31, 2002. If you have questions or comments before that time, please feel free to contact us.

Recommendation

The Office of General Counsel recommends that the Commission approve the attached Final Rules and Explanation and Justification for publication in the *Federal Register* and transmittal to Congress.

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Parts 102 and 110

[Notice 2002-XX]

Contribution Limitations and Prohibitions

AGENCY: Federal Election Commission

ACTION: Final rules and transmittal of regulations to Congress.

SUMMARY: The Federal Election Commission is issuing these final rules to implement amendments made by the Bipartisan Campaign Reform Act of 2002 ("BCRA") to the contribution limitations and prohibitions of the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"). These rules increase the limits on contributions made by individuals and political committees; index certain contribution limits for inflation; prohibit contributions by minors to candidates, authorized committees and committees of political parties and donations by minors to committees of political parties; and prohibit contributions, donations, expenditures, independent expenditures and disbursements by foreign nationals. These rules also revise the Commission's rules for designating contributions to particular elections and attributing contributions to particular donors. Further information is provided in the Supplementary Information that follows.

EFFECTIVE DATE: January 1, 2003.

FOR FURTHER INFORMATION CONTACT: Ms. Mai T. Dinh, Acting Assistant General Counsel, Mr. J. Duane Pugh, Acting Special Assistant General Counsel (redesignations and reattributions), or Attorneys Mr. Michael G. Marinelli (contribution limitations), Ms. Dawn M. Odrowski (contributions by minors) or Ms. Anne A. Weissenborn (foreign nationals), 999 E Street, N.W., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (Mar. 27, 2002), contains extensive and detailed amendments to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 et seq. This is one of a series of rulemakings the Commission is undertaking to implement the provisions of BCRA.

Section 402(c)(1) of BCRA establishes a general deadline of 270 days for the Commission to promulgate regulations to carry out BCRA. The President of the United States signed BCRA into law on March 27, 2002, so the 270-day deadline is December 22, 2002.

Because of the brief period before the deadline for promulgating these rules, the Commission received and considered public comments expeditiously. The Notice of Proposed Rulemaking ("NPRM") on which these final rules are based was published in the Federal Register on August 22, 2002. 67 FR 54,366 (Aug. 22, 2002). The written comments were due by September 13, 2002. The names of commenters and their comments are available at http://www.fec.gov/register.htm under "Contribution Limitations and Prohibitions." The NPRM stated that the Commission would hold a hearing on the proposed rules if it received a sufficient number of requests to testify. After reviewing the comments received and in light of the relatively small number of requests to testify, the Commission decided not to hold a public hearing on this rulemaking. A notice canceling the proposed hearing was published on the Commission's website on October 2, 2002 (http://www.fec.gov/press/20021002cancel.html) and in the Federal Register on October 7, 2002. 67 FR 62,410 (October 7, 2002).

Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the Federal Register at least 30 calendar days before they take effect. The final rules on contribution limitations and prohibitions were transmitted to Congress on November >>, 2002.

Introduction

The final rules address five major topics: (1) increased limits on contributions made by certain persons to candidates, by political party committees to Senate candidates, and by individuals in a 2-year period; (2) indexing of certain contributions limits for inflation; (3) prohibition on contributions, donations, expenditures, independent expenditures and disbursements by foreign nationals; (4) prohibition on contributions by minors to candidates, authorized committees, and committees of political parties and on donations by minors to committees of political parties; and (5) designation of contributions to particular elections and attributing contributions to particular contributors.

Four of the five topics involve implementing specific provisions of BCRA. BCRA's amendments to 2 U.S.C. 441a(a) that increase contribution limits for individuals and political committees are implemented by amending 11 CFR 110.1, 110.2 and 110.5 and adding new section 110.17 on indexing the contributions limits for inflation. BCRA's amendments to 2 U.S.C. 441e to strengthen and expand the ban on campaign contributions and donations by foreign nationals is implemented by removing and reserving 11 CFR 110.4(a), the former regulation addressing foreign nationals, and adding new section 110.20. BCRA's ban on contributions by minors to Federal candidates and contributions and donations by minors to committees of political parties at 2 U.S.C. 441k is implemented by removing 11 CFR 110.1(i)(2), the former regulation addressing contributions by minors, and adding new section 110.19.

In light of BCRA's focus on contribution limits, the Commission has also decided to streamline its rules for redesignating contributions for a particular election and reattributing contributions to particular contributors. These changes are reflected in amendments to 11 CFR 110.1(b)(5) and 110.1(k)(3).

Explanation and Justification

11 CFR 102.9 Accounting for Contributions and Expenditures

Recordkeeping requirements play a crucial role in ensuring compliance with FECA's and BCRA's contributions limitations, as noted in the NPRM. 64 FR at 54,372. Accordingly, the Commission sought comment on a variety of proposals to modify the recordkeeping requirements in 11 CFR 102.9. Two commenters were opposed to any change; one noted that electronic records should be sufficient, provided they are in readable form. Another commenter supported the Commission's proposal to require political committees to maintain photocopies or electronic copies of contributors' checks. The Commission has determined that requiring retention of photocopies or electronic copies of contributors' checks will facilitate audits that determine compliance with contribution limits. Therefore, 11 CFR 102.9(a) is amended to require political committee treasurers to maintain either a full-size photocopy or a digital image of each check or written instrument by which a contribution is made. If a political committee elects to retain digital images, it must be prepared to provide the Commission with the computer equipment and software needed to retrieve and read the digital images at no cost to the Commission. New 11 CFR 102.9(a)(4).

Additionally, the Commission is also amending the supporting evidence requirements for redesignations and reattributions in connection with other changes made to redesignations and reattributions, as explained below in the discussion of 11 CFR 110.1(l).

Paragraph (e) of 11 CFR 102.9 is amended to clarify that its requirements apply to contributions designated in writing by the contributor pursuant to 11 CFR 110.1(b)(2)(i), contributions treated as such pursuant to 11 CFR 110.1(b)(2)(ii), contributions redesignated in writing by the contributor pursuant to new 11 CFR 110.1(b)(5)(ii)(A), or contributions designated by presumption pursuant to new 11 CFR 110.1(b)(5)(ii)(B). Additionally, a technical change is made to 11 CFR 102.9(c) to clarify that the requirement for candidates not in the general election to refund any contributions designated or treated as contributions for the general election applies to all candidates and authorized candidates.

11 CFR 110.1 Contributions by Persons Other than Multi-Candidate Political Committees

1. 11 CFR 110.1(a) Scope

Section 110.1(a) sets out the scope of the regulations in 11 CFR 110.1. The final rules in this paragraph contain amended citations to the provisions concerning minors and foreign nationals. This final rule is substantially identical to the proposed rule, and the Commission did not receive any comments concerning paragraph (a).

2. 11 CFR 110.1(b)(1) Increases in Limitations on Contributions to Candidates

The Act limits the amount that individuals and certain other persons may contribute to candidates and political committees, including political party committees with respect to Federal elections. 2 U.S.C. 441a(a)(1). The pre-BCRA provisions of the Act permitted persons to contribute up to $1,000 to Federal candidates per election and up to $20,000 per calendar year to political committees established and maintained by national political parties. For contributions made on or after January 1, 2003, BCRA amends 2 U.S.C. 441a(a)(1)(A) to increase the amount persons may contribute to Federal candidates to $2,000 per election. Section 110.1(b)(1), which contains the contribution limitation of 2 U.S.C. 441a(a)(1)(A), is therefore, being amended to incorporate the new increased $2,000 contribution limit. Paragraph (b)(1) in the final rules, with some minor revisions, is substantially identical to proposed paragraph (b)(1) in the NPRM. The Commission did not receive any comments on this provision.

FECA also permits certain persons to contribute up to $5,000 per year to any other political committees. 2 U.S.C. 441a (a)(1)(C). This contribution limit was left unchanged by BCRA. However, BCRA did revise 2 U.S.C. 441a(a)(1) by adding paragraph (D), which permits persons to make up to $10,000 in contributions to a political committee established and maintained by a State committee of a political party in a calendar year. This statutory provision was implemented by the addition of new paragraph (c)(5) to section 110.1. See Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money Final Rules, 67 Fed. Register 49,063 (July 29, 2002).

BCRA mandates that the limit for contributions by individuals and other persons under 2 U.S.C. 441a(a)(1)(A) be increased every odd-numbered year by the percentage difference in the price index between the current year and the base year of 2001. 2 U.S.C. 441a(c)(1)(B). The mechanics of the indexing are set forth in 11 CFR 110.17, which is discussed below. However, in order to alert the reader that the contribution limits are adjusted every two years, section 110.1(b)(1)(i) contains a cross reference to section 110.17. Additionally, paragraph (b)(1)(ii) sets forth the 2-year time period in which the increased contribution limits are to be in effect. That 2-year period starts the day after the previous general election and ends on the day of the next regularly scheduled general election.

Because the contribution limits may change every two years, depending upon the consumer price index, paragraph (b)(1)(iii) states that the Commission will publish the new contribution limits in effect in the Federal Register every odd-numbered year and maintain that information on its website. One commenter supported this change.

3. 11 CFR 110.1(b)(3) Net Debts Outstanding

The NPRM raised the issue of the effect of the increase on contribution limits due to the inflation adjustment on contributions made after an election that are used to satisfy the net debts outstanding of a candidate's authorized committees related to that previous election. The NPRM sought comment on the following hypothetical: if the contribution limit were to be increased from $2,000 to $2,100, effective November 3, 2004, and contributor X makes a $2,000 contribution to candidate Y in October of 2004, could contributor X make a $100 contribution after November 3, 2004 designated for that general election, provided that candidate Y's principal campaign committee still has net debts outstanding?

The Commission received several comments concerning this issue. All the commenters who addressed this, including the Congressional sponsors of BCRA, argued against permitting the increase in the contribution limits to apply to contributions made to pay off net debts outstanding from any election held prior to the increase in the contribution limits. Instead, these commenters proposed that any increased contribution limits should only apply to elections held after the date on which the indexing triggers a higher contribution limit. Several of these commenters noted the confusion that would ensue for both contributor and recipient committees if multiple contribution limits applied to the same election. The Commission agrees with this reasoning. In addition, it finds no evidence that Congress intended candidates in a deficit position after an election to have the benefit of accepting larger contributions than candidates who have no debts outstanding for that election. Consequently, the Commission is persuaded that the increase in the contribution limits should not be applied to previous elections. This interpretation will reduce the occurrence of multiple changes to the contribution limits for elections. The Commission also notes that the retroactive application of 2 U.S.C. 441a(c)(1)(C) specifically begins on the date after the previous general election, and can thus be construed to mean that the increase in the contribution limits does not apply to any previous election.

To make clear that the increase in contribution limits cannot be used to retire net debts outstanding from previous elections, the Commission is amending section 110.1(b)(3)(iii). This regulation sets forth the conditions under which candidates may accept contributions to retire net debts outstanding after the date of a previous primary or general election. The Commission is renumbering the two existing conditions as paragraphs (b)(3)(iii)(A) and (B) and is adding the additional requirement at paragraph (b)(3)(iii)(C) that contributions received for net debts outstanding arising from previous elections do not exceed the contribution limitatons in effect on the date of such election.

4. 11 CFR 110.1(b)(5)(ii) Redesignations

A. Introduction

In the NPRM, the Commission stated that BCRA's renewed focus on contribution limits coincided with the Commission's consideration of updating and streamlining its rules for designating contributions for a particular election or attributing contributions to particular contributors. See NPRM, 67 FR at 54,371. Under existing regulations, all contributions are either designated in writing by the contributor, 11 CFR 110.1(b)(2)(i), or treated as contributions for the next election after the contribution is made. 11 CFR 110.1(b)(2)(ii). This is in order to ensure that no person contributes more than the individual contribution limit to any candidate with respect to a particular election. 2 U.S.C. 441a(a)(1)(A). Commission regulations permit political committees in certain circumstances to obtain a written redesignation signed by the contributor. 11 CFR 110.1(b)(5)(ii). The Commission presented proposed rules in the NPRM that would permit the authorized committees of candidates to redesignate contributions pursuant to a presumption in certain circumstances. NPRM, 67 FR at 54,376. Additionally, the NPRM proposed amending the rules pertaining to reattribution of contributions similar to the rules on redesignation. This proposal is addressed in the Explanation and Justification for 11 CFR 110.1(k)(3)(ii), discussed below.

One commenter applauded the Commission's consideration of the contribution redesignation regulations that it characterized as "confusing and burdensome both for committees and contributors." In contrast, several commenters noted that BCRA neither requires nor anticipates a reexamination of the redesignation rules. BCRA's silence on these issues led one commenter to the conclusion that these issues would be more appropriately addressed in a separate rulemaking that does not arise from BCRA, while another found the Commission's reexamination well-timed, as an effort to simplify FECA compliance generally, which will improve the ability of political committees to comply with the new requirements of BCRA. In light of the new contribution limits and other statutory changes in BCRA, the Commission has concluded that this rulemaking provides an appropriate vehicle for simplifying the rules governing redesignation.

B. 11 CFR 110.1(b)(5)(ii)(A) Existing Redesignation Rule

Because the Commission has decided to provide for an alternative method for redesignation of contributions, 11 CFR 110.1(b)(5)(ii) requires a technical amendment in order to incorporate the new provision within this section. Thus, this rulemaking redesignates former section 110.1(b)(5)(ii)(A) and (B) as section 110.1(b)(5)(ii)(A)(1) and (2), respectively. This rulemaking does not amend the regulatory language of these provisions.

C. 11 CFR 110.1(b)(5)(ii)(B) Redesignation of Certain Excessive Primary Contributions

Current 11 CFR 110.1(b)(5) sets forth the procedure for the redesignation of excessive contributions to candidates and authorized committees from any person, except multicandidate committees and those persons prohibited from making contributions. See 11 CFR 110.1(a). When seeking a redesignation of an excessive contribution, a committee treasurer must offer the contributor a refund and obtain a signed, written redesignation from the contributor within 60 days of the treasurer's receipt of the contribution. See 11 CFR 110.1(b)(5)(ii). These requirements apply to excessive contributions that were designated in writing by the contributor, 11 CFR 110.1(b)(5)(i)(A) and (B), or that were not designated in writing by the contributor, 11 CFR 110.1(b)(5)(i)(C) and (D), in which case 11 CFR 110.1(b)(2)(ii) treats the contributions as made for the next election for that Federal office after the contributions are made.[1] In addition to written redesignations, the Commission is amending 11 CFR 110.1(b)(5) to permit authorized committees to redesignate contributions that would otherwise be excessive without obtaining a signed, written document under certain circumstances, as discussed below.

As proposed in the NPRM, the Commission is amending these regulations to include a mechanism to simplify redesignation procedures for certain excessive primary contributions by using a presumption. See NPRM, 67 FR at 54,371, new 11 CFR 110.1(b)(5)(ii)(B). This presumption applies only when a contributor makes an excessive contribution to a candidate's authorized committee before a primary election that is not designated in writing for a particular election. In such circumstances, a candidate's authorized committee may presume that the contributor intended to contribute any excessive amount to that candidate's general election, without obtaining written permission from the contributor to treat the excess as a general election contribution. This presumption should not be inferred, however, in instances where the contributor has expressly designated a contribution in writing for a different election.

The Commission agrees with the commenter who noted the reasonableness of a presumption that a contributor of a large contribution to a primary election campaign

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[1] These requirements apply whether the contributions are excessive on their face or in aggregation with other contributions, 11 CFR 110.1(b)(5)(i)(A) and (C), or were designated for an election and were made after the election, but cannot be accepted because the contributions exceed net debts outstanding from the past election, 11 CFR 110.1(b)(5)(i)(B), or were received after an election but undesignated, and the authorized committee has net debts outstanding from the previous election. 11 CFR 110.1(b)(5)(i)(D).

would also support the general election campaign of the same candidate. That commenter reasoned that the primary and general elections occur in the same year and are two stages of one process to elect a candidate to a particular office. However, the Commission disagrees with another commenter who argued that written redesignations most often serve as barriers to contributor intent, which in the commenter's view is generally to support the candidate to the maximum extent possible. The Commission retains its rules on written redesignations in all other situations described in 11 CFR 110.1(b)(5)(i)(A) through (D). Only in the specific circumstance presented in new 11 CFR 110.1(b)(5)(ii)(B) will the presumption suffice to replace a written redesignation.

Thus, the Commission is revising section 110.1(b)(5)(ii)(B) to permit an authorized committee to redesignate excessive contributions to the general election if the following conditions are satisfied. First, the contribution must be made before the primary election. Second, the contribution must not have been designated in writing for another election. Third, the contribution would be excessive if designated for or treated as a contribution made for the primary election, and fourth, the redesignation does not cause the contributor to exceed any other contribution limit. These conditions are set forth in paragraphs (b)(5)(ii)(B)(1) through (4), respectively. The final rule also requires that the authorized committee notify the contributor of the redesignation. This requirement is discussed in further detail below.

D. 11 CFR 110.1(b)(5)(ii)(B)(5) and (6) Notice to Contributors

With respect to the redesignation of certain primary contributions, the NPRM included two alternatives, Alternatives 1-A and 1-B. See proposed 11 CFR 110.1(b)(5)(ii)(B), NPRM, 67 FR at 54,371 and 54,376. The alternatives differed in whether an authorized committee employing the presumption to redesignate a contribution would be required to notify the contributor that such action is being taken. Alternative 1-A would not have required any notification to the contributor, while Alternative 1-B would have required notification through the addition of paragraphs (b)(5)(ii)(B)(5) and (6). See NPRM, 67 FR at 54,371 and 54,376.

Alternative 1-A was designed to minimize the administrative burden on authorized committees when a contributor's intent could be reasonably inferred. See id. at 54,371. Some commenters preferred this approach. One viewed it as a better balance between the Commission's need to ensure that committees follow procedures and the committees' need for flexibility. Greater flexibility for the committees was the basis for another commenter's support. Another found Alternative 1-A to be consistent with contributor intent and with BCRA's change in the individual aggregate contribution limit from an annual to an election cycle basis. See 2 U.S.C. 441a(a)(3). The Commission notes, however, that BCRA changes the individual aggregate contribution limit to a bi-annual basis that only approximates the election cycle for the U.S. House of Representatives. More importantly, Congress did not change the per candidate contribution limits from a per-election to an election-cycle basis.

Alternative 1-B in the Commission's proposal would have required that the authorized committee inform the contributor that a portion of the contribution is being redesignated to the general election, and that the contributor may request a refund instead. As with Alternative 1-A, no confirmation from the contributor would have been required.

This alternative attracted the support of several commenters, as well. One commenter found that the presumption combined with notice to the contributor reasonably approximates contributor intent, with notice ensuring that any other contributor intent can be honored. Similarly, another argued Alternative 1-B strikes the appropriate balance between the administrative burden imposed on authorized committees and the need to honor contributor intent, noting that some primary election contributors might plan to support a different candidate in the general election. Another commenter supported the notice required under Alternative 1-B because it would provide an opportunity for the contributor to "opt-out" and receive a refund, instead of permitting the redesignation, and because it is more likely to prevent the contributor from inadvertently making an excessive contribution to the general election.

The notice and refund procedure serves to confirm the presumption that a contributor of an excessive, undesignated contribution to the primary election would consent to a redesignation of the excessive portion of the contribution to the general election. The authorized committee may assume acquiescence on the part of the contributor if the contributor does not respond to the notification. However, if the contributor does not want the contribution to be redesignated, the notice provides a mechanism by which the contributor may object to the redesignation and request a refund or a reattribution under 11 CFR 110.1(k)(3)(ii). Additionally, the Commission notes that the trigger for a committee's use of the presumption—an undesignated excessive contribution—suggests the contributor may benefit from information about the contribution limits in FECA. Contributors need to know if a contribution was redesignated or reattributed so that they can avoid an inadvertent excessive contribution.

Any authorized committee that seeks to retain a contribution that would otherwise constitute a violation of law can fairly be required to notify the contributor of the means by which it has remedied the violation of law. Thus, new paragraph (b)(5)(ii)(B)(5) requires the treasurer to notify the contributor of the redesignation and provide an opportunity to the contributor to request a refund. In such a notice, the committee may, if it wishes, also seek a written reattribution under 11 CFR 110.1(k)(3)(ii)(A); however, authorized committees are not required to include this information in the notice pursuant to 11 CFR 110.1(b)(5)(ii)(B)(5).

The Commission has determined that notifying contributors is necessary when authorized committees redesignate excessive contributions that were initially considered primary contributions by operation of 11 CFR 110.1(b)(2)(ii) to be general election contributions. The Commission has therefore adopted Alternative 1-B as proposed in the NPRM, with clarification to the notice procedure as described below. See NPRM, 67 FR at 54,371 and 54,376. The Commission believes that, in the precise circumstances discussed, it is reasonable to infer that the contributor of an otherwise excessive primary contribution would likely not object to redesignating a portion of that contribution to the general election campaign. The contributor's check establishes the contributor's intent to contribute the funds to the candidate's authorized committee. The contribution limits in FECA prohibit the excessive contributions at issue, so the presumption permits the authorized committee to honor the contributor's intent in a manner that avoids a violation of law by both the recipient committee and the contributor.

Authorized committees may notify contributors by paper mail, email, fax, or any other written method. The authorized committee must do so within thirty days of the treasurer's receipt of the contribution. See new 11 CFR 110.1(b)(5)(ii)(B)(6). The notice must be written in order to avoid opportunities for fraud, so the option to communicate orally has been deleted from paragraph (b)(5)(ii)(B)(6). The thirty-day requirement protects contributor intent by providing notice on a reasonably contemporaneous basis.

E. 11 CFR 110.1(b)(5)(ii)(C) Redesignation of Certain Excessive General Election Contributions

The Commission sought comment on whether to permit backward-looking presumptions, so that excessive general election contributions received after a primary election could be designated by an authorized committee to pay off primary debt. See NPRM, 67 FR at 54,371. Three commenters favored a backward-looking presumption in certain circumstances. One supported the presumption in the situation described, provided that the authorized committee has net debts outstanding for the primary election. Another supported the presumption, provided that it is limited to elections in the same election cycle. A third supported the presumption, provided that the contributor receives notice. Finally, one commenter argued against such a backward-looking presumption because it would require more complex considerations by the contributors. However, the Commission notes that the burden of calculating net debts outstanding for the primary election falls on the authorized committees, not on the contributors.

The Commission has determined that the backward-looking presumption, in limited circumstances, should apply subject to the same conditions as the redesignation presumption in 11 CFR 110.1(b)(5)(ii)(B). The Commission notes that current 11 CFR 110.1(b)(3)(iv) permits a candidate in the general election to pay primary election debts and obligations with general election contributions. Thus, if a contributor designates in writing that a non-excessive contribution should be considered for the general election, the recipient committee may nonetheless use those funds to pay primary debts, pursuant to 11 CFR 110.1(b)(3)(iv). In this situation, it would be incongruous if a recipient committee had less flexibility with contributions that are not designated in writing than it would have with those that are designated in writing.

Consequently, the Commission has incorporated such a presumption in new 11 CFR 110.1(b)(5)(ii)(C). The presumption can be applied to an excessive contribution that is made after the primary election date, but before the general election and that was not designated in writing by the contributor. 11 CFR 110.1(b)(5)(ii)(C)(1) and (2). The committee must have more net debts outstanding as calculated under 11 CFR 110.1(b)(3)(ii) from the primary than the excessive portion of the contribution. 11 CFR 110.1(b)(5)(ii)(C)(5). The conditions in 11 CFR 110.1(b)(5)(ii)(C)(3), (4), (6), and (7) are similar or identical to the conditions set forth in 11 CFR 110.1(b)(5)(ii)(B)(3), (4), (5), and (6), respectively. It is important to note, however, that if a contributor makes an excessive contribution and designates the contribution in a signed writing for the general election, then the authorized committee would be required to obtain a signed writing from the contributor to redesignate any portion of the contribution to the primary. See new 11 CFR 110.1(b)(5)(ii)(C)(2).

5. 11 CFR 110.1(c) Contributions to Political Party Committees

The pre-BCRA provisions of the Act permitted persons to contribute up to $20,000 per calendar year to the political committees established and maintained by the national political parties. BCRA amends 2 U.S.C. 441a(a)(1)(B) to increase the amount that may be contributed by individuals and certain other persons to political committees established and maintained by national political parties to $25,000 per calendar year. Consequently, the Commission is amending paragraph (c)(1) to increase the amount that may be contributed by those covered by 2 U.S.C. 441a(a)(1)(B) to committees established and maintained by national political parties to $25,000 per year. No comments were received on this change. Paragraph (c)(2) of this section provides that these committees consist of the national committees, and the House and Senate campaign committees.

The Commission is adding new paragraphs (c)(1)(i), (ii) and (iii) to section 110.1. These paragraphs parallel new paragraphs (b)(1)(i), (ii) and (iii) discussed above. Paragraph (c)(1)(i) provides for application of the indexing provisions at 11 CFR 110.17 to the contribution limitation for contributions to national party committees. New paragraph (c)(1)(ii) establishes the two-year period in which the indexing is applied. New paragraph (c)(1)(iii) provides for the periodic publication by the Commission of the increased contribution limits. When proposed in the NPRM, the new paragraphs (c)(1)(i) and (c)(1)(iii) received no comments. These paragraphs are left substantially unchanged from the NPRM in the final rules. The comments relating to paragraph (c)(1)(ii) regarding the timing of the increase in the contribution limit due to the application of the indexing provisions are addressed below in the Explanation and Justification for new section 110.17.

6. 11 CFR 110.1(i) Contributions by Spouses

As explained below in the Explanation and Justification for new 11 CFR 110.19, 2 U.S.C. 441k prohibits contributions made by minors to Federal candidates and contributions and donations to committees of political parties, but it does not prohibit contributions or donations to other types of political committees such as corporate and labor organization separate segregated funds and non-connected political committees (often referred to as "PACs"). Moreover, although BCRA's prohibition on minors' contributions and donations is effective as of November 6, 2002, it specifically provides that those prohibitions will not apply with respect to runoff elections, recounts or election contests resulting from elections held prior to November 6, 2002. See 2 U.S.C. 431 note.

The proposed rules would have amended the pre-BCRA provision governing contributions by minors at former 11 CFR 110.1(i)(2) to reflect these two points. The Commission has decided instead to move the pre-BCRA minors provision to new 11 CFR 110.19 so that all of the provisions regarding minors are addressed in one section of the regulations. Therefore, the final rules move the minors provision at former 11 CFR 110.1(i)(2) to new 11 CFR 110.19(d). The final rules also include a separate provision at 11 CFR 110.19(c) regarding application of the minors' prohibition to runoff elections, recounts, and election contests held before November 6, 2002. See below for further discussion. As a result of this move, Section 110.1(i) addresses only contributions by spouses, a provision that is unchanged. Therefore the final rules amend the title of paragraph (i) to "Contributions by Spouses" to reflect the remaining focus of this paragraph.

7. 11 CFR 110.1(k)(3)(ii) Reattribution

A. Introduction

In connection with the proposed amendments to the redesignation rules, the NPRM also included a similar proposal to amend the reattribution rules. Current 11 CFR 110.1(k)(3) sets forth the procedures for the reattribution of excessive contributions to other joint contributors. Contributions from more than one person must include each contributor's signature, and each such contributor is attributed an equal share of the contribution unless other instructions are provided. 11 CFR 110.1(k)(1) and (2). A committee may ask a contributor who made an excessive contribution if a joint contribution was intended. 11 CFR 110.1(k)(3)(i). In order to reattribute a contribution in such a situation, a committee treasurer must offer the contributor a refund and must obtain within sixty days of the contribution a written reattribution signed by each of the contributors. 11 CFR 110.1(k)(3)(ii). (Unlike redesignation, which is limited to authorized committees because of the relationship of the contribution to particular elections pursuant to 2 U.S.C. 441a(a)(1)(A), the reattribution procedure is available to all political committees, any of whom could receive joint contributions.) The same commenters who supported the Commission's proposal to amend the redesignation rules also supported the proposal to amend the reattribution rules for the same reasons. Likewise, commenters who did not favor the Commission's proposal regarding redesignation also did not support amending the reattributions rules at this time.

B. The Proposal and Comments

The Commission proposed a presumption related to reattribution in the NPRM.

When funds are contributed by a check or other written instrument with two or more names imprinted on the check, but with only one signature, the entire contribution is attributed to the individual whose signature appears on the check. See 11 CFR 104.8(c) and 110.1(k)(1). Alternatives 2-A and 2-B in proposed 11 CFR 110.1(k)(3)(ii)(B) in the NPRM both included a presumption that with respect to such contributions that are excessive, a committee would be permitted to presume that the contribution should be attributed equally among those whose names appeared on the check or other instrument. See NPRM, 67 FR at 54,371 and 54,377. Like the redesignation alternatives, Alternative 2-B would have required the recipient committee to notify the contributors, while Alternative 2-A would not have required any notice. See id.

Three commenters opposed both Alternatives 2-A and 2-B. The three agreed that inferring a non-signer's intent to contribute in the absence of any indication from that individual is extremely unreliable and carries a greater risk of error than the redesignation presumption. One commenter observed that the non-signer might not support the same candidates and political committees that the signer supports. Even if he or she does support the same candidates, if the non-signer is unaware of the contribution, he or she may inadvertently make an excessive contribution to the same committee. Another of the three found Alternative 2-B unacceptable because the burden of "opting-out," that is choosing to request a refund instead of permitting the reattribution, would be on the contributor, whereas the commenter believed the burden should be on the recipient committee. A fourth commenter agreed with the presumption, arguing that contributors do not generally believe more than one signature would be required because usually only one person signs a particular check. This commenter also argued that any indication of intent to make a joint contribution should suffice, citing examples of accompanying correspondence, a donor card, or a notation on a check. Under such circumstances, this commenter would not require notification. In the absence of any indication of such an intent, this commenter supports the approach of Alternative 2-B, which would require the recipient committee to notify the contributors of the reattribution.

C. 11 CFR 110.1(k)(3)(ii)(A) Existing Reattribution Rule

Because the Commission has decided to provide for an alternative method for reattribution of contributions, 11 CFR 110.1(k)(3)(ii) requires a technical amendment in order to incorporate the new provision within this section. Thus, this rulemaking redesignates former section 110.1(k)(3)(ii)(A) and (B) as section 110.1(k)(3)(ii)(A)(1) and (2), respectively. This rulemaking does not amend the regulatory language of these provisions.

D. 11 CFR 110.1(k)(3)(ii)(B) Presumption of a Reattribution

The Commission has concluded that the changes required by BCRA provide an appropriate occasion to promulgate regulations that will provide authorized committees with additional means of reattributing certain contributions. Thus, it has adopted Alternative 2-B with two modifications. Under paragraph (k)(3)(ii)(B)(1), if an excessive contribution is made with a written instrument with more than one individual's name imprinted upon it, but only one signature, the permissible portion of the contribution will be attributed to the signer, and the committee may reattribute any excessive portion of the contribution to any other individual whose name is imprinted on the written instrument.

Thus, the final rule differs from the proposed rule in that the proposed rule would have divided excessive contributions equally among the names listed on the check. The final rule takes a different approach in order to attribute the maximum permissible amount to the signer because that contributor's intent is clear. Only excessive funds would be reattributed pursuant to the presumption to another contributor whose name appears preprinted on the check, and only to the extent that this reattribution would not cause that other individual to exceed his or her contribution limit.

The Commission has determined that notice to the contributors is essential to make any presumption in this situation reasonable. The political committee employing this presumption is required to notify all contributors and offer the signer contributor a refund under paragraph (k)(3)(ii)(B)(2).

The committee is also required to notify the contributors that they must have had an ownership interest in the funds in the account for any portion of the contribution to be reattributed to them. If the individual to whom the contribution is reattributed does not own the funds in the account, the signer would have made a contribution in the name of another, which is prohibited by 2 U.S.C. 441f. For example, an additional individual's name may be preprinted on a check merely for the convenience of the account's owner, but only one of the individuals appearing on the check owns the funds. Such a situation might arise if one individual has check-writing responsibilities for another. Committees should not attribute any part of the contribution to individuals who do not have an ownership interest in the funds in the account. The final rules do not affect 11 CFR 110.1(i) in this regard, which states that the limitations on contributions apply separately to contributions made by each spouse, even if only one spouse has income.

Any committee is free to include this information about spouses in any notice, but is not required to do so by new 11 CFR 110.1(k)(3)(ii)(B)(2). The final rules differ from the proposed rules in that the final rules recognize that the appearance of a name preprinted on a check does not necessarily indicate that the named individual has an ownership interest in the funds in the account.

As noted in the NPRM, the Commission and political committees have devoted significant resources to ensure compliance with the reattribution requirements. The Commission agrees with the commenter who noted that joint contributors often indicate their intention to jointly contribute in some fashion other than by both signing one personal check. However, the Commission also agrees that a presumption based only on an individual's name appearing on a check is not reliable standing alone. Consequently, the Commission is adopting the requirement that political committees notify all of the joint contributors to whom any portion of the contribution is reattributed. The committee may make the notice in any written form and must do so within thirty days of the treasurer's receipt of the contribution. See new 11 CFR 110.1(k)(3)(ii)(B)(3). The thirty-day requirement protects contributor intent by providing notice on a reasonably contemporaneous basis. Like the redesignation notice provision, section 110.1(k)(3)(ii)(B)(3) has been clarified to permit notice by any written method. Authorized committees may, if they choose, provide contributors with a single notice as to any permissible redesignation and any permissible reattribution.

E. Other Proposals Relating to Redesignation and Reattribution for Which No Changes to the Rule Are Being Made

(1) 11 CFR 110.2 Multicandidate Contributions

Current 11 CFR 110.2(b)(5) sets forth the procedure for redesignation of excessive contributions made by multicandidate committees. In the NPRM, the Commission asked commenters to address whether excessive contributions from multicandidate committees should be subject to any form of redesignation by presumption. Only one commenter supported any such application, while two opposed it. These two argued that a signed writing should be required from multicandidate committees because these committees are likely to be sufficiently familiar with the existing Commission requirements so that the higher standard of specificity required from them is not burdensome. The Commission agrees that the redesignation presumption is inappropriate for multicandidate committees, so no change has been made to 11 CFR 110.2.

(2) Expanding the Redesignation Presumption Beyond the Election Cycle

The Commission also asked in the NPRM if presumptions that would permit authorized committees to redesignate contributions beyond the current election cycle to either earlier or subsequent cycles were appropriate. See NPRM, 67 FR at 54,371. Only one commenter supported any presumption that reaches beyond a current cycle; that commenter argued that redesignations to elections in future cycles were acceptable if the contributors were notified. The other commenters argued that any presumptions should be limited to the current cycle. One said inferring donative intent would be difficult as the extent to which a contributor supports a candidate can vary significantly from one election cycle to another. Another noted that this might be so because candidates' positions on issues can change, and candidates are likely to face different opponents in previous or subsequent cycles. Another noted that recordkeeping would be complicated for the committees (which may change from one election to the next), the contributors, and the Commission if such a presumption were adopted. The Commission agrees with many of these comments and has decided to limit the redesignation and reattribution presumptions to within one election cycle.

(3) Separate Accounts for Redesignated Contributions

The Commission asked in the NPRM if it should revise 11 CFR 102.9 to require that an authorized committee maintain a separate account for general election contributions accepted before the primary election occurs. See NPRM, 67 FR at 54,371-72. Three commenters addressed this proposal. Two commenters who opposed the requirement stated that separate accounts are unnecessary. One argued that the public record consists of all of a candidate committee's accounts combined, even if the funds are in fact in separate accounts. Consequently, they argued that the public record, which specifies to which election contributions are designated, would not be augmented by a committee's maintenance of separate accounts. Should an authorized committee be subject to a Commission audit, this commenter argued that the Audit Division is capable of calculating whether a committee spent general election funds on the primary election campaign. Another commenter noted that separate accounts do not "specifically aid in compliance" and that separate accounts are not required by BCRA. One commenter supported the requirement, arguing that the Commission has a valid concern regarding the use of general election funds in a primary election campaign, which could permit the contributor and the committee to effectively double the contribution limit with respect to the primary election. This commenter also argued that separate accounts are a modest burden for committees and may be preferable to maintaining separate books and records.

Although the Commission believes maintaining a separate account is the best way for an authorized committee to show its compliance with the prohibition on spending general election contributions in connection with a primary election, the Commission is reluctant to require that authorized committees maintain separate accounts when other means of accounting, which may be better suited to an organization, will suffice to prevent the use of general election contributions in connection with a primary election. Consequently, the Commission declines to amend 11 CFR 102.9 in this regard.

(4) Eliminating the Signature Requirements

The Commission sought comment on whether it should eliminate the signature requirement for all redesignations and reattributions under 11 CFR 110.1 and 110.2, and instead permit authorization from the contributor by email or through oral communications with the contributor when the recipient committee creates and maintains a contemporaneous signed record of the conversation. See NPRM, 67 FR at 54,371.

All of the commenters who addressed this issue thought an email should suffice, instead of a writing signed by the contributor. Some commenters were opposed to permitting committees to memorialize conversations to serve as documentation of redesignations or reattributions, as discussed above in connection with 11 CFR 110.1(l).

In adopting the new means of redesignation and reattribution in 11 CFR 110.1(b)(5)(ii)(B), 110.1(b)(5)(ii)(C), and 110.1(k)(3)(ii)(B), the Commission has concluded that no contributor response is required for the reattributions and redesignations pursuant to the new presumptions, so no contributor signature is required. However, the designation and attribution regulations require contributor signatures in other instances. See, e.g., 11 CFR 110.1(b)(4)(ii), new 110.1(b)(5)(ii)(A)(2), 110.1(k)(1), and new 110.1(k)(3)(ii)(A)(2). In these situations, the regulations require a response from the contributor, and thus require the response to be in writing and signed by the contributor in order to prevent fraud and to clearly indicate who is contributing. Cf. 11 CFR 104.8(c) (requiring contributions to be reported as made by the last person signing the instrument). While email may be an appropriate vehicle for contributor responses in some instances, it may raise complicating issues that have not been addressed in this rulemaking. For example, with respect to reattributions, how could a committee determine whether both contributors have consented to the reattribution? The Commission has concluded that permitting email to replace a contributor's signature should be undertaken in connection with a rulemaking that considers all of the instances in Commission regulations in which this issue is present, rather than making that change in some instances, but not others, and in the absence of a full consideration of issues similar to the one raised above. Therefore, the Commission has concluded that existing rules should not be amended in this rulemaking to permit email messages to take the place of signed written redesignations or reattributions under revised 11 CFR 110.1(b)(5)(ii)(A)(2) or 11 CFR 110.1(k)(3)(ii)(A)(2). Consequently, no further changes to the regulations are being made in this rulemaking.

8. 11 CFR 110.1(l)(4) and (5) Supporting Evidence

As noted in the NPRM, the adoption of the notification approach requires 11 CFR 110.1(l)(4) to be amended to specify the supporting evidence required to be retained under such an approach. See NPRM, 67 FR at 54,371. A full-size copy of the check or written instrument, any signed writings from the contributors that accompanied the contribution, and the political committee's notices required for redesignations under 11 CFR 110.1(b)(5)(ii)(B) or (C) or reattributions under 11 CFR 110.1(k)(3)(ii)(B) are included among the supporting evidence that must be retained for the redesignation or reattribution to be effective. See new 11 CFR 110.1(l)(4)(ii). Paragraph (l)(5) has also been revised to state that if a political committee fails to retain the notices, then the presumptions for the redesignations or the reattributions will not be effective.

Some commenters supported the proposal that would have permitted committees to orally notify contributors and write a memorandum regarding the conversation to document it. Others opposed this aspect of the proposal as an inherently unreliable process that would provide too great an opportunity for fraud and abuse. The Commission agrees with the latter comments, so the final rules with regard to the redesignation and reattribution presumptions require the notice to be in writing or by email. See new 11 CFR 110.1(b)(5)(ii)(B)(6); 110.1(b)(5)(ii)(C)(7); and 110.1(k)(3)(ii)(B)(3).

One technical correction is included in 11 CFR 110.1(l)(5) as well. The citation to paragraph (l)(2) in the first sentence should be to paragraph (l)(1) instead.

11 CFR 110.2 Contributions by Multicandidate Political Committees

Section 110.2 sets forth the dollar limits on contributions made by multicandidate committees, as generally established by 2 U.S.C. 441a(a)(2). BCRA substantially amended the contribution limit for certain types of multicandidate committees specified in 2 U.S.C. 441a(h), which is addressed in section 110.2. As a result, the Commission is amending the regulations to reflect the new limits set forth in more detail below.

Under pre-BCRA 2 U.S.C. 441a(h), the Republican and Democratic Senatorial campaign committees or the national committee of a political party or any combination of such committees were permitted to contribute up to $17,500 to a candidate for election or nomination for election to the U.S. Senate during the year of the election. BCRA amends this section of the Act to increase the amount that may be contributed by these committees to Senatorial candidates to $35,000 on or after January 1, 2003. Consequently, 11 CFR 110.2(e), which contains this contribution limit, is being amended to increase the limit to $35,000.

New paragraph (e)(1) sets forth the amended contribution limit. The Commission did not receive any comment on its proposal to amend paragraph (e)(1). New paragraph (e)(2) parallels the provisions in sections 110.1(c)(1)(i), (ii) and (iii) and 110.1(b)(1)(i), (ii) and (iii). New paragraph (e)(2) provides for the application of the indexing provisions at 11 CFR 110.17 to this contribution limitation and establishes the two-year period in which the increased contribution limits are in effect. New paragraph (e)(2) also provides for the periodic publication by the Commission of the increased contribution limit. When first proposed in the NPRM, this paragraph received one comment supporting the intention to publish information regarding the adjusted contribution limit. The comments relating to paragraph (e)(2) that concern the timing of the increase in the contribution limit due to the application of the indexing provisions are addressed in the Explanation and Justification for new section 110.17, below.

11 CFR 110.4 Contributions in the Name of Another; Cash Contributions

Previously, 11 CFR 110.4(a) set forth regulations implementing the prohibitions on contributions and expenditures by foreign nationals codified at 2 U.S.C. 441e. In light of the amendments to 2 U.S.C. 441e contained in BCRA, section 110.4(a) is being removed and reserved, and new 11 CFR 110.20 is being created to implement BCRA's prohibition on contributions, donations, expenditures, independent expenditures, and disbursements by foreign nationals.

In addition, the section heading has been changed to cover the two topics addressed in this section: (1) contributions made in the name of another and (2) cash contributions.

11 CFR 110.5 Aggregate Bi-annual Contribution Limitations for Individuals

Aside from the limits on the dollar amounts that individuals may contribute to candidates and political committees, 2 U.S.C. 441a(a)(3) also contains aggregate limits on the amount that individuals may give within a specified period of time. These contribution limits are set forth in the Commission's regulations at 11 CFR 110.5.

However, as with sections 110.1 and 110.2 discussed above, BCRA substantially amended the FECA by restructuring the aggregate contribution limits. As a result, the Commission is amending the regulations in section 110.5 to reflect the new contribution limits in BCRA.

1. 11 CFR 110.5(a) Scope

Section 110.5(a) sets forth the scope of the regulations in 11 CFR 110.5. The final rules in this paragraph contain amended citations to the provisions concerning minors and foreign nationals. This final rule is identical to the proposed rule, on which the Commission received no comments.

2. 11 CFR 110.5(b) Bi-annual Limitations

BCRA amends the provisions in FECA that establish the total amount of contributions that may be made by individuals within the prescribed time periods. Under former 2 U.S.C. 441a(a)(3), individuals were permitted to make no more than $25,000 in aggregate contributions per calendar year. This section was revised by BCRA to establish new bi-annual aggregate limits that permit individuals to make up to $95,000 in contributions, including up to $37,500 in contributions to candidates and their authorized committees, and up to $57,500 in contributions to any other political committees. 2 U.S.C. 441a(a)(3)(A) and (B). The $57,500 aggregate contribution limit contains a further restriction in that no more than $37,500 of this amount may be given to political committees that are not the political committees of national political parties. 2 U.S.C. 441a(a)(3)(B).

Current 11 CFR 110.5(b) is being amended to incorporate the increased bi-annual aggregate contribution limits, which are effective on January 1, 2003. New paragraph (b)(1)(i) contains the new bi-annual aggregate limit for contributions to candidates and their authorized committees. New paragraph (b)(1)(ii) contains the new bi-annual aggregate limit for contributions to other political committees. The Commission received no comments on the changes to paragraphs (b)(1)(i) and (ii) of this section.

Sections 441a(i)(1)(C) and 441a-1(a)(1)(B) of FECA contain an exception to the bi-annual contribution limits for individuals. Under these new provisions of BCRA, the individual contribution limits to candidates for the U.S House of Representatives and U.S. Senate are increased during certain limited time periods if the candidate is opposing another candidate who makes expenditures from his or her personal funds above a certain threshold. Contributions made under these increased dollar limits do not apply to the individual contributor's bi-annual aggregate limits. 2 U.S.C. 441a(i)(1)(C) and 441a-1(a)(1)(B). Accordingly, new section 110.5(b)(2) reflects this exception, which will be addressed in greater detail in a separate rulemaking concerning the so-called "millionaires' amendment." One commenter, while agreeing generally with proposed paragraph (b)(1)(iii), suggested that the language in the draft rule was not direct enough in making this point. The Commission agrees and thus, new paragraph (b)(2) states more precisely the circumstances under which the individual bi-annual limits on contributions do not apply to contributions coming under 2 U.S.C. 441a(i)(1)(C) or 441a-1(a)(1)(B).

Section 110.5 (b)(3) provides for the increase, if necessary, in the bi-annual aggregate contribution limits by the percent difference in the price index, as described in 11 CFR 110.17. New paragraph (b)(3) also provides that the time period in which the price indexing applies also applies to the aggregation of contributions for purposes of the application of the bi-annual aggregate limits. Again, the various comments received on this issue are discussed in the Explanation and Justification for new section 110.17. An example of how the time period would operate for both the increase and the aggregation is included in new paragraph (b)(4). This paragraph has been revised from its proposed form in the NPRM to provide for greater clarity. New paragraph (b)(5) states the Commission's intention to publish information regarding the adjusted contribution limits in the Federal Register and on the Commission's web site. One commenter supported publishing the adjusted contribution limits. New paragraphs (b)(3) and (b)(5) contain provisions parallel to that found 11 CFR 110.1(b) and (c) and 110.2(e). These paragraphs of the final rules contain minor wording revisions but are nearly identical to the proposed versions, on which the Commission received no comments.

11 CFR 110.9 Violations of Limitations

The final rules at 11 CFR 110.9, formerly entitled, "Miscellaneous provisions," are being amended to address only violations of the contribution and expenditure limitations. Other provisions in 11 CFR 110.9 addressing fraudulent misrepresentations, the price index increase, and the voting age population are being or will be amended and moved in this rulemaking and other BCRA rulemaking projects.[3] The title of section

[3] The BCRA rulemaking project entitled "Other Provisions" will address the fraudulent misrepresentation provisions. See Notice of Proposed Rulemaking ("NPRM") at 67 FR 55,348, 55,356 (August 29, 2002).

110.9 is also being changed to "Violations of limitations" to reflect these changes. Finally, the final rules add the word "knowingly" in two places pertaining to the acceptance of contributions in violation of the limitations and prohibitions set forth in 11 CFR part 110. This revision mirrors the knowledge requirement in 2 U.S.C. 441a(f) and 441f. No comments were received on this revision or the reorganization of these provisions.

The prohibition on contributions by minors is contained in 2 U.S.C. 441k and not in 2 U.S.C. 441a of the Act. Therefore, the Commission notes that in instances where a candidate, an authorized committee, or a committee of a political party knowingly accepts a contribution from a minor, it would be in violation of section 110.9 only if the contribution is made in the name of another, but not if the contribution was made with the minor's own funds. See 2 U.S.C. 441a(f)("no candidate or political committee shall knowingly accept any contribution...in violation of the provisions of this section").

11 CFR 110.17 Price Index Increase

Pre-BCRA 2 U.S.C. 441a(c) mandated yearly indexing to inflation of the expenditure limitations established by 2 U.S.C. 441a(b) (the limits on expenditures by candidates for nomination and election to the office of President of the United States who accept public funding) and 2 U.S.C. 441a(d) (the limits on expenditures by national party committees, State party committees, or their subordinate committees in connection with

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The BCRA rulemaking project entitled "Coordination and Independent Expenditures" will address the voting age population provisions. See NPRM at 67 FR 60,042, 60,060 (September 24, 2002).

the general election campaign of candidates for Federal office). BCRA amends 2 U.S.C. 441a(c) to extend the inflation indexing to: (1) the limitations on contributions made by persons under 2 U.S.C. 441a(a)(1)(A) (contributions to candidates) and 441a(a)(1)(B) (contributions to national party committees); (2) the bi-annual aggregate contribution limits applicable to individuals now found at 2 U.S.C. 441a(a)(3); and (3) the limitation on contributions made to U.S. Senate candidates by certain political party committees at 2 U.S.C. 441a(h). 2 U.S.C. 441a(c)(1)(B). Under the statute, the adjustments for inflation for 2 U.S.C. 441a(a)(1)(A), 441a(a)(1)(B), 441a(a)(3) and 441a(h) are to be made only in odd-numbered years and such increases are to be in effect for the 2-year period beginning on the first day following the date of the general election in the preceding year and ending on the date of the next regularly scheduled general election. 2 U.S.C. 441a(c)(1)(C).

Former 11 CFR 110.9(c), which described the expenditure limits subject to inflation indexing, did not include any of the new inflation indexing discussed above. In order to address the price indexing for the new contributions and expenditures limitations in a comprehensive manner, the Commission is adding new section 110.17 to track the changes to 2 U.S.C. 441a(c).

<u>1. 11 CFR 110.17(a) Price Index Increases for Party Committee Expenditure and Presidential Candidate Expenditure Limitations</u>

New section 110.17(a) replaces and restates, with some minor rewording, former section 110.9(c) regarding the price index increases that apply to the political party committee and Presidential candidate spending limits established by 11 CFR 110.7 and 110.8. However, paragraph (a) contains one important change from former section

11 CFR 110.9(c). Section 110.9(c) had incorrectly stated that the expenditure limitations established by sections 110.7 and 110.8 would be increased by the annual percent difference of the price index, as certified to the Commission by the Secretary of Labor. Section 441a(c) of the Act does not use an annual percent difference of the price index to calculate the increases. Instead, it requires the use of the percent difference between the price index for the 12 months preceding the beginning of the calendar year in which the change is made and the base period. For the party committee expenditures limitations and the Presidential candidate expenditures limitations, the base period is calendar year 1974, with each change remaining in effect for a calendar year. Consequently, paragraph (a) of new 11 CFR 110.17 correctly states the standard to be applied and deletes the term "annual" from the regulation. The Commission received no comment on this change.

2. 11 CFR 110.17(b) Price Index Increases for Contributions by Persons, by Political Party Committees to Senatorial Candidates, and the Bi-annual Aggregate Contribution Limitation for Individuals

As noted above, BCRA increased the number of contribution limitations now subject to price index increases. 2 U.S.C. 441a(c)(1)(B). New 11 CFR 110.17(b) tracks BCRA by providing that the following contribution limits will be indexed to inflation: 11 CFR 110.1(b)(1) (limits for persons contributing to candidates and authorized political committees); 11 CFR 110.1(c)(1) (limits for contributions made to national party committees); 11 CFR 110.2(e) (limits for contributions made by party committees to Senatorial candidates); and 11 CFR 110.5 (bi-annual aggregate contribution limits for individuals). New section 110.17(b)(1) specifies that these contribution limitations will be increased during odd-numbered years and that the increased limit would be in effect for a two-year period. However, the time period specified in paragraph (b)(1) for the beginning and ending point of the two-year period and the resulting comments stems from the need to resolve an apparent internal conflict in BCRA.

The NPRM raised the issue of the interaction between 2 U.S.C. 441a(a)(3), which establishes the bi-annual aggregate contribution limits for individuals, and 2 U.S.C. 441a(c)(1)(C), which mandates indexing to inflation of these bi-annual aggregate contribution limits. Section 441a(a)(3) of FECA specifically provides that the bi-annual aggregate limits for contributions made by individuals apply during the period that begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year. For example, contributions would be aggregated from January 1, 2005 to December 31, 2006. However, increases in the contribution limits as a result of the inflation indexing as applied by 2 U.S.C. 441a(c)(1)(C) would be in effect from the day after the general election to the date of the next general election, e.g. November 3, 2004 to November 7, 2006. After November 7, the next two-year inflation indexing period would alter the bi-annual aggregate contribution limits again. Thus, these competing time limits seem to dictate different contributions limits for the period from November 3, 2004, to January 1, 2005, and cannot be applied simultaneously. Therefore, the NPRM noted that the conflict between 2 U.S.C. 441a(a)(3) and 441a(c)(1)(C) had to be resolved to determine the time period in which the bi-annual aggregate contribution limits apply.

The Commission proposed in the NPRM to resolve the conflict by applying the time period in 2 U.S.C. 441a(c)(1)(C), i.e. election cycle basis, rather than the time period prescribed in 2 U.S.C. 441a(a)(3), i.e. calendar year basis. In the NPRM, the

Commission proposed that 11 CFR 110.17(b)(1) require that the increase would be effective from the first day following the date of the last general election to the date of the next general election. The Commission also proposed that 11 CFR 110.5(b)(3) require the two-year period for the aggregation of contributions by individuals run during the same period - the day after the date of last general election through the date of the next general election.

As support for its interpretation in the NPRM, the Commission relied upon accepted cannons of statutory construction. One principle of statutory interpretation is that, where two provisions of a statute are in conflict, the provision that is last in time or last in order of arrangement prevails. See Inter-Continental Promotions v. MacDonald, 367 F.2d 293 (5th Cir. 1966). In this instance, both provisions of BCRA were enacted at the same time. However, because 2 U.S.C. 441a(c)(1)(C) appears later than 2 U.S.C. 441a(a)(3) in order of arrangement, both in BCRA and in the United State Code, 2 U.S.C. 441a(c)(1)(C) would determine the time period of the bi-annual contribution limits for 2 U.S.C. 441a(a)(3).

Several commenters, including the Congressional sponsors of BCRA, urged that the Commission adopt the opposite approach in the new regulations and apply the calendar year aggregation in 2 U.S.C. 441a(a)(3) instead of the time period in the indexing provisions of 2 U.S.C. 441a(c)(1)(C). The main argument of these commenters is that 2 U.S.C. 441a(a)(3), and several of the other provisions that use a calendar year, are "core" provisions of the Act. By contrast, they argue that the indexing provisions represent "subservient" or "accessory provisions." Therefore, according to these commenters, it would be more appropriate from a policy position to use the timing element from the core provisions.

The Commission notes that there is no support in the legislative history of BCRA for a "core" provision argument. The only cannon of statutory construction that is applicable to this situation supports the conclusion that the timing of the indexing provision would prevail because it is the last in arrangement. As a matter of public policy, to apply the increases due to inflation indexing on a the calendar year basis would nullify a specific and important element of 2 U.S.C. 441a(c)(1) - the retroactive application of inflation indexing of contribution limits to the day after the date of the last regularly scheduled general election.

Furthermore, the limitation on contributions to candidates in 2 U.S.C. 441a(a)(1) operates on a per-election basis and therefore, is not in conflict with 2 U.S.C. 441a(c)(1)(C). The Commission must apply any increases to this contribution limit due to the inflation retroactivity to the day after the previous general election regardless of how it resolves the conflict between 2 U.S.C. 441a(a)(3) and 441a(c)(1)(C). If the Commission decided to apply increases due to inflation indexing to the bi-annual contribution limits on a calendar year basis rather that on an election cycle basis, this would confuse some contributors who would have an increase in one contribution limitation effective retroactively to the day after the general election and an increase in another contribution limitation effective on January 1.

For these reasons, the final rules set the time period for the bi-annual contribution limits and application of inflation indexing increases to be from the day after the general election, i.e. the first Wednesday following the first Monday in November of an even-numbered year, to the date of the next regularly scheduled general election, i.e. the first

Tuesday following the first Monday in November of the next even-numbered year. See new sections 110.1(b)(1)(ii) and (c)(1)(ii), 110.2(e)(2), 110.5(b)(3) and (4), and 110.17(b). Under these new rules, run-off elections following the general election do not postpone the increase in the annual contribution limits.

One commenter noted that each of the contribution limits described in 2 U.S.C. 441a(a) and (h) that is subject to the expanded indexing provisions has its own period of operation. Thus, two of these limits that operated on a calendar year basis may also be in conflict with the time period for the inflation indexing increases. First, the limit on contributions by persons to national party committees is a calendar year limit. See 2 U.S.C. 441a(a)(1)(B) and 11 CFR 110.1(c)(1). Second, the limit on national party committee contributions to Senate candidates is a calendar year limit.[3] See 2 U.S.C. 441a(h) and 11 CFR 110.2(e)(1). The third contribution limit subject to the indexing is the contribution limit to candidates. As stated above, that contribution limit operates on a per-election basis. Therefore, this commenter urged the Commission to issue rules that apply the increases to the calendar year limits due to inflation indexing on a calendar year basis.

The Commission disagrees with the commenter who observed that the conflict with inflation indexing extends beyond the aggregate bi-annual individual contribution limits at 2 U.S.C. 441a(a)(3). While the aggregate contribution limitations and the

[3] The commenter noted that this limit is also somewhat like a per-election-cycle limit, since section 110.2(e) treats party committee contributions made in a year other than the year in which the recipient Senate candidate seeks election as though they were made in the election year. Thus, all contributions made during the six-year election cycle count toward a single contribution limit.

indexing operate over an overlapping two-year period, the other three contribution limitations operate on a calendar year or per-election basis. These three contribution limitations do not have the same timing issues as the bi-annual individual contribution limitations and thus are not in conflict with the indexing provisions.

New paragraph (b)(2) of 11 CFR 110.17 establishes that 2001 is the base year for the calculation of the price index difference. No comments were received regarding this paragraph. One commenter noted that while the contribution limits may be increased due to indexing to inflation, the exact amount of the increase may not be precisely known or formally published until after January of the odd-numbered year. The commenter urged that the Commission establish a "safe harbor" to deal with these circumstances. This commenter suggested allowing political committees to receive contributions in excess of previous contributions limits while granting a period of time after the publication of the new limits to refund "de minimis excessive contributions" without triggering enforcement consequences.

The Commission believes that the creation and implementation of this approach would be problematic. Determining or defining what amounts should be treated as de minimis poses difficulties. In the discussion regarding net debts outstanding and increased contribution limits, the Commission noted the confusion that would exist if multiple contribution limits attached to the same election. Similarly, allowing political committees to determine what amounts to accept in anticipating the indexing adjustments would also create confusion and, in effect, multiple contribution limits. The operation of a safe harbor would, therefore, be administratively challenging and could also undermine the contribution limits. Also, during times when inflation is low, it is possible that there would be no increase in certain limits due to the operation of the rounding provisions. See the Explanation and Justification for new 11 CFR 110.17(c) below. For these reasons, the Commission has determined that the acceptance of "de minimis" excessive contributions is not appropriate and is not included in the final rules.

3. 11 CFR 110.17(c) Rounding of Price Index Increases

A further change in 2 U.S.C. 441a(c) is the introduction of a rounding provision for all the amounts that are increased by the indexing to inflation in 2 U.S.C. 441a (including the Presidential expenditure limits at 2 U.S.C. 441a(b) and coordinated party spending limits at 2 U.S.C. 441a(d)). If the inflation – adjusted amount is not a multiple of $100, it is rounded to the nearest multiple of $100. 2 U.S.C. 441a(c)(1)(B)(iii). New section 110.17(c) implements the new rounding provision found at 2 U.S.C. 441a(c)(B)(iii). This final rule, which is identical to the proposed rule, did not draw any comments.

4. 11 CFR 110.17(d) Definition of Price Index

New section 110.17(d) tracks 2 U.S.C. 441a(c)(2)(A) by specifically defining the "price index" as the average over a calendar year of the Consumer Price Index (all items-United States city average) published by the Bureau of Labor Statistics. The Department of Labor computes the CPI using two population groups: All Urban Consumers (CPI-U) and Clerical Workers (CPI-W). The CPI-U represents approximately 87% of the total United States population while the CPI-W, a subset of the CPI-U, represents 32% of the total United States population.[4] While neither the FECA nor BCRA specifies which population group is to be used, the Commission has historically used the more inclusive CPI-U since that appears to be the best method to calculate changes in the affected limitations. The Commission received one comment supporting the use of the CPI-U and no comments supporting the use of the CPI-W. Therefore, for the reasons identified above, the Commission will continue to use the CPI-U when calculating the percent change in the Consumer Price Index.

5. 11 CFR 110.17(e) Publication of Price Index Increases

New section 110.17(e) in the final rules states that the Commission will announce the amount of the adjusted expenditure and contribution limitations in the Federal Register and on the Commission's web site. The Commission received one comment supporting this provision and none opposing it.

6. Application of the First Increase Due to Percent Changes in the Price Index

The increased contribution limits of 2 U.S.C. 441a(a)(1)(A) and (B), 441a(a)(3), and 441a(b) apply to contributions made on or after January 1, 2003. However, under the interpretation outlined above, 2 U.S.C. 441a(c)(1)(C) requires that these same contribution limits be increased through indexing for inflation in odd-numbered years with the increase in effect starting with the day following the last general election in the previous year. This could imply that the initial contribution limits authorized by BCRA to take legal effect on January 1, 2003 should also be increased by the difference in the

[4] The CPI published by the Department of Labor may be found at http://www.bls.gov/cpi/home.htm.

price index. Several comments, including one from the Congressional sponsors of BCRA, disagreed with this interpretation and instead urged that the first increase in the limits should occur in 2005 and take effect in November 3, 2004, which is the day after the general election.

One comment noted that it was legally impossible for the indexing provision to be given their full effect in 2003. According to the commenter, the new contribution limits are effective on or after January 1, 2003. For the indexing provisions to be given a full effect in 2003, any increase in the contribution limit would be retroactively applied, making the effective date November 6, 2002, rather than the statutorily mandated effective date of January 2, 2003. Even though the legislative history is otherwise silent on this point, this legal impossibility strongly implies that these provisions were intended to be applied first in 2005. After considering these comments, the Commission agrees that the indexing provisions should be first applied in 2005.

11 CFR 110.19 Contributions and Donations by Minors

1. Introduction

BCRA prohibits individuals who are 17 years old and younger (minors) from making contributions to Federal candidates and contributions and donations to committees of political parties. See 2 U.S.C. 441k. Senator McCain, a primary sponsor of BCRA, stated during the Senate debate on the legislation that the prohibition on contributions by minors "restores the integrity of the individual contribution limits by preventing parents from funneling contributions through their children, many of whom are simply too young to make such contributions knowingly." 148 Cong. Rec. S2145-2146 (daily ed. March 20, 2002).

The final rules at new 11 CFR 110.19 implement BCRA's prohibitions on contributions and donations by minors at 2 U.S.C. 441k. Because 2 U.S.C. 441k expressly prohibits only contributions by minors to candidates and contributions and donations by minors to committees of political parties, contributions by minors to other types of political committees, such as separate segregated funds and non-connected political committees, will continue to be governed by the provisions of the pre-BCRA regulations. These regulations are being moved from former 11 CFR 110.1(i)(2) to 11 CFR 110.19(d). The final rules include also an exemption for minors who are emancipated in accordance with State law.

2. 11 CFR 110.19(a) Contributions to Candidates

Paragraph (a) of 11 CFR 110.19 prohibits contributions by minors to Federal candidates. The paragraph specifies that the prohibition on contributions by minors to Federal candidates includes contributions to a candidate's principal campaign committee, to any other authorized committee of that candidate, and to any entity directly or indirectly established, financed, maintained or controlled by one or more Federal candidates.

The Commission sought comment on whether prohibiting contributions by minors to entities directly or indirectly established, financed, maintained or controlled by one or more Federal candidates is within the scope of 2 U.S.C. 441k. The only commenter to address this issue supported prohibiting minors' contributions to such entities, opining that the prohibition would further BCRA's purpose of ensuring that contribution limits are not evaded by a parent funneling money through a child. The Commission agrees. This provision could apply, for example, to a "leadership PAC" established by a Federal candidate to the extent that a particular PAC falls within the definition of an entity directly or indirectly established, financed, maintained or controlled by a federal candidate. In such cases, a minor is prohibited from contributing to the PAC, thereby preventing a parent from evading the contribution limit for such an entity through the child. Thus, the final rules include this prohibition.

The Commission also sought comment in the NPRM as to whether the regulations should make clear that the relevant time for determining whether a minor has made a prohibited contribution or donation is the age of the minor at the time he or she makes a contribution. No comments were received on this issue. The final rules do not include a separate provision addressing this point because reference in the rules to 11 CFR 110.1(b)(6), which addresses when a contribution is made, provides sufficient clarification.

3. 11 CFR 110.19(b) Contributions and Donations to Committees of Political Parties

New 11 CFR 110.19(b) implements BCRA's prohibition on contributions and donations by minors to "a committee of a political party." The proposed rules at 11 CFR 110.19(b) interpreted this provision as a prohibition on contributions and donations to national, State, district and local party committees. In light of BCRA's language prohibiting donations as well as contributions to political party committees, the Commission proposed to interpret 2 U.S.C. 441k to prohibit minors from making any donations whatsoever to State, district and local party committees, including to their non-Federal accounts. In the alternative, the Commission sought comment on whether a narrower construction of BCRA's prohibition on donations to State, district and local party committees was warranted. Specifically, the Commission sought comment on prohibiting donations by minors to the extent such amounts are used to conduct activities affecting Federal elections but to permit these donations if used for exclusively non-Federal purposes to the extent permitted by State law.

Two commenters addressed this issue. One commenter stated that BCRA's prohibition should not extend to minors' contributions to State, district and local party committees because the purpose of the provision is to prevent parents from evading federal contribution limits by funneling contributions to their children. The commenter argued that aside from limits on Levin funds, which can be used to finance certain "Federal election activities" by State and local parties, BCRA does not limit funds given to State and local parties. The same commenter also rejected the narrower construction described in the NPRM that would prohibit minors' donations to State and local party committees only to the extent that they were to finance activities affecting Federal elections. The commenter argued that concerns that minors' contributions might be used as Levin funds should be addressed in a rulemaking addressing those funds.

A second commenter stated that though contributions by minors to State and local party committees do not risk circumvention of federal contribution limits "since there are no such limits," the statutory language at 2 U.S.C. 441k does not limit the prohibition on contributions or donations by minors to federal accounts of State and local party committees. Other commenters, including the Congressional sponsors of BCRA, did not directly address the issue of minors' donations to political party committees but noted that minors may continue to make donations directly to State and local candidates to the extent permitted under State law.

The final rule at 11 CFR 110.19(b)(1) follows the proposed rule by prohibiting contributions and donations by minors to national, State, district and local committees of a political party. Further, the Commission believes that interpreting the prohibition on donations to encompass both non-Federal accounts and Federal accounts of political party committees is appropriate. Interpreting the phrase "committee of a political party" to encompass only national party committees would render the prohibition on "donation" meaningless because national party committees must no longer accept non-Federal funds under 2 U.S.C. 441i. Similarly, the prohibition on "donation" would have no meaning if the minor's prohibition encompassed only Federal accounts of party committees since funds accepted by Federal accounts, used for the purpose of influencing Federal elections, are considered to be "contributions" not "donations." Thus, BCRA preempts State law to the extent that State law permits minors to make donations to State, district and local party committees.

Prohibiting donations by minors to all committees of State, district, and local parties also has a Federal purpose because donations of non-Federal funds to State parties could otherwise be used, in part, to finance Federal election activities, as defined at 2 U.S.C. 431(20). <u>See also</u>, 11 CFR 100.24(a) and (b) in Final Rules for Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 <u>FR</u> 49,064, 49,110-49,111 (July 29, 2002). These activities, including voter registration and get-out-the vote activities conducted within a specific time frame, are required under BCRA to be funded either wholly with Federal funds or with a combination of Federal funds and another category of funds regulated by BCRA known as "Levin funds." See 67 FR at 49,098 and 49,125-49,126 (11 CFR 300.32(c) and 300.33(a) and accompanying Explanation and Justification). Although Levin funds may be raised from sources permitted under State law, BCRA limits the amount of such funds to $10,000 per donor. Thus, to the extent that donations to State and local party committees may be used for such activities, BCRA limits those donations. Prohibiting minors from making donations serves to prevent parents from circumventing those donation limits through minor children, just as the prohibition on contributions by minors serves to prevent evasion of the contribution limits.

The Commission has decided not to include in the final rules the alternative suggested in the NPRM that would permit minors to make donations to non-Federal accounts of State and local party committees if the recipient committee can show by establishing separate accounts or through a reasonable accounting method that the donation is used for exclusively non-Federal purposes. As discussed above, the statutory language is broad and does not distinguish between Federal and non-Federal accounts of party committees. Additionally, this approach would require State and local committees to track yet another type of donation or establish another account in addition to those it already tracks or maintains, thereby resulting in an additional administrative burden to those groups. See, e.g., 67 FR at 49,093 (Explanation and Justification for 11 CFR 300.30).

Accordingly, as interpreted by the final rules, BCRA preempts State law to the extent that State law permits individuals under 18 years of age to donate funds to State, district and local party committees. This preemption may have little practical effect in some states. As pointed out in the NPRM, many states treat contributions by minors as contributions by their parent(s) or guardian(s). See for example, Kan. Stat. Ann. 25-4153(c) and Okla. Stat. t. 74, 257:10-1-2(a)(1) and (b)(2).

Paragraph (b)(2) of the final rules is unchanged from the proposed rules. It prohibits contributions and donations by minors to entities directly or indirectly established, financed, maintained or controlled by a committee of a national, State, district or local political party. No comments were received on this provision.

As discussed above in the Explanation and Justification for paragraph (b)(1), the Commission interprets the prohibition on contributions and donations by minors to committees of political parties to include accounts of party committees and entities established, financed, maintained or controlled by these party committees, including their Federal and non-Federal accounts. Consequently, new paragraph (b)(3) of the final rules makes clear that the prohibition on contributions and donations by minors encompasses donations to any accounts of a committee or entity described in paragraphs (b)(1) and (b)(2) of this section.

4. 11 CFR 110.19(c) Contributions and Donations by Minors for Certain Runoffs, Recounts and Election Contests

As noted above, BCRA provides that its prohibition on contributions and donations by minors to candidates and political parties does not apply with respect to runoff elections, recounts or election contests resulting from elections held prior to November 6, 2002. See 2 U.S.C. 431 note. Consequently, the final rules at 11 CFR

110.19(c) state that BCRA's prohibitions on contributions and donations by minors shall not apply to contributions or donations made with respect to runoff elections, recounts, or election contests if such runoffs, recounts and election contests result from an election held before November 6, 2002. The final rule in paragraph (c) also provides that contributions made with respect to runoff elections resulting from an election held prior to November 6 shall be subject to the conditions set forth in paragraphs (d)(1) through (d)(3) of section 110.19. As discussed below, paragraphs (d)(1) through (d)(3) restate the provisions of 11 CFR 110.1(i)(2), the prior regulations governing contributions by minors. Because funds given in connection with a recount or election contest are not considered contributions for some purposes under 11 CFR 100.91, donations by minors for recounts or election contests resulting from an election held before November 6, 2002 will not be limited. However, for elections held after November 6, 2002, minors are prohibited from making donations for recounts or election contests to committees of political parties or entities directly or indirectly established, financed, maintained or controlled by them.

The proposed rules addressed contributions by minors for runoff elections, recounts or election contests held prior to November 6, 2002 in proposed 11 CFR 110.1(i)(3). No comments were received on this issue.

5. 11 CFR 110.19(d) Contributions to Political Committees That Are Not Authorized Committees or Committees of Political Parties

Because 2 U.S.C. 441k specifically prohibits contributions by minors to candidates and political party committees and not to other types of unauthorized committees, proposed 11 CFR 110.19(c) contemplated that minors could continue to make unearmarked contributions to unauthorized political committees except political party committees, in accordance with the requirements of 11 CFR 110.1(i)(2), the prior rules governing contributions by minors. The Commission sought comment in the NPRM as to whether 2 U.S.C. 441k could be interpreted to also prohibit contributions by minors to other political committees such as separate segregated funds and non-connected political committees. None of the commenters addressed this issue.

The final rules adhere to the plain language of 2 U.S.C. 441k in permitting minors to continue to make contributions to these other political committees under the existing rules. Thus, the final rules at 11 CFR 110.19(d)(1) through (d)(3) restate the regulations governing contributions by minors, which are being moved from 11 CFR 110.1(i)(2) and amended to reflect that they now govern unearmarked contributions by minors to unauthorized political committees other than political party committees. Paragraph (d) provides that an individual under 18 years of age may make contributions in accordance with the contribution limits set out at 11 CFR 110.1 and 110.5, if all of the following conditions are satisfied: (1) the minor voluntarily and willingly makes the decision to contribute; (2) the funds, goods or services contributed are owned or controlled exclusively by the minor; (3) the contribution is not made from the proceeds of a gift given to the minor to make a contribution or is not in any way controlled by an individual other than the minor; and (4) the contribution is not earmarked or otherwise directed to one or more Federal candidates or political committees or organizations described in sections 110.19(a) and (b).

The reorganization of the final rule clarifies that the types of committees to which a minor may continue to contribute are political committees not described in 110.19(a) and (b), provided that the contribution is not earmarked to a candidate, committee or organization described in 110.19(a) and (b). The final rules also clarify that non-earmarked contributions to these other political committees will continue to be governed by the existing regulations governing contributions by minors. No comments were received on this provision.

6. 11 CFR 110.19(e) Volunteer Services

Paragraph (e) of the final rule makes clear that minors are not prohibited from volunteering their services to Federal candidates, political party committees or other political committees, in accordance with legislative intent. See 148 Cong. Rec. S2146 (daily ed. March 20, 2002)(statement of Senator McCain). The final rule is identical to proposed 11 CFR 110.19(d). The Commission received one comment addressing volunteer services. The commenter agreed that under 2 U.S.C. 441k minors could continue to participate in any type of political campaign by volunteering.

7. 11 CFR 110.19(f) Definition of Directly or Indirectly Established, Financed, Maintained or Controlled.

The final rule at 11 CFR 110.19(f) is identical to the language of the proposed rule in 11 CFR 110.19(e). It refers the reader to 11 CFR 300.2(c) for the definition of an entity "directly or indirectly established, financed, maintained, or controlled." For the definition, see Final Rules for Excessive and Prohibited Contributions: Non-Federal

Funds or Soft Money, 67 FR at 49,121. The Commission believes that it is preferable to use the same definition of a term throughout the BCRA regulations to promote consistency and avoid confusion where, as here, doing so would not undermine the purpose of the statute. One commenter expressed support for using the same definition of the term throughout the BCRA regulations, although the same commenter noted that it had disagreed with the definition of "directly or indirectly established, financed, maintained or controlled" contained in 11 CFR 300.2(c) in its comments on the NPRM on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money.

8. Proposed Exemption for Emancipated Minors

The Commission also sought comment in the NPRM as to whether minors who are emancipated under State law should be exempt from it. Under many State laws, a petition for a judicial declaration or order of emancipation requires consideration as to whether a minor manages his or her own financial affairs or is financially self-supporting. Emancipation also has the effect, in most cases, of conferring upon a minor the rights and responsibilities of an adult, and relieving a child of parental control, thereby diminishing the possibility that a parent would funnel contributions or donations through an emancipated minor child.

Five commenters addressed this issue. Four commenters, including the congressional sponsors of BCRA, expressed support for such an exemption. These commenters agreed that the risk of parental evasion of the contribution limits through an emancipated minor was either not present or diminished. The fifth commenter agreed that the risk of parental circumvention of contribution limits was less of a concern in the case of an emancipated minor. However, this commenter argued that the statutory language clearly prohibited contributions by minors based solely on age.

The Commission has decided not to include an exemption for emancipated minors in the final rules, given the plain language of 2 U.S.C. 441k, which prohibits certain contributions and donations by minors on the basis of age alone and not on a minor's legal or financial independence from a parent.

11 CFR 110.20 Prohibition on Contributions, Donations, Expenditures, Independent Expenditures and Disbursements by Foreign Nationals

As indicated by the title of section 303 of BCRA, "Strengthening Foreign Money Ban," Congress amended 2 U.S.C. 441e to further delineate and expand the ban on contributions, donations, and other things of value by foreign nationals. BCRA expressly applies the ban to contributions and donations solicited, accepted, received, or made directly or indirectly in connection with State and local, as well as Federal office. 2 U.S.C. 441e(a)(1)(A) and (a)(2). Furthermore, the prohibition applies to: (1) contributions and donations to committees of political parties; (2 donations to Presidential inaugural committees; (3) donations to party committee building funds; (4) disbursements for electioneering communications; (5) expenditures; and (6) independent expenditures. 2 U.S.C. 441e(a)(1)(B) and (C); 36 U.S.C. 510. Consequently, the Commission is amending 11 CFR part 110 to implement the revised statutory provision. The final rules remove and reserve 11 CFR 110.4(a), the former regulation that addressed foreign nationals. New section 110.20 implements BCRA's prohibition on contributions, donations, expenditures, independent expenditures, and disbursements by foreign nationals. This new section also implements the provision in 2 U.S.C. 441e(a)(2) that prohibits persons from knowingly soliciting, accepting, or receiving contributions and donations from foreign nationals, and adds prohibitions against the knowing provision of substantial assistance with foreign national contributions or donations, including, but not limited to, serving as a conduit or intermediary. "Foreign national" and "knowingly" are defined for purposes of this section.

<u>1. 11 CFR 110.20(a)(1) and (2) Definitions of "Disbursement" and "Donation"</u>

New section 110.20(a) defines for purposes of this section several words or phrases that are either not defined in other sections of the Act or that are defined elsewhere so as to cover only Federal elections. Two of these, namely "disbursement" and "donation" were not defined in the proposed rules; however, comments were sought as to whether the final rules should include definitions of these terms.

Although the Commission did not receive any comments regarding a definition of "disbursement," it believes additional guidance to be necessary in light of the use of "disbursement" in BCRA in the context of the foreign national prohibition, and its corresponding and repeated use in new section 110.20. Thus, the final rules at 11 CFR 110.20(a)(1) incorporate the definition of this term in new 11 CFR 300.2(d). One commenter urged the Commission to import the definition of "donation" in 11 CFR 300.2(e) into section 110.20(a). For the same reason that the Commission considers it necessary to provide guidance as to "disbursement" in section 110.20, it agrees that section 110.20(a) should also include a definition of "donation." Consequently, paragraph (a)(2) incorporates the definition of "donation" at 11 CFR 300.2(e) into section 110.20.

2. 11 CFR 110.20(a)(3) Definition of "Foreign National"

Section 110.20(a)(3), which defines "foreign national," generally follows the definition at former 11 CFR 110.4(a)(4). Section 110.20(a)(3)(i) incorporates "foreign principal" as defined in 22 U.S.C. 611(b) within the definition of "foreign national." Paragraph (a)(3)(ii) includes non-citizens but excludes permanent residents of the United States as defined in 8 U.S.C. 1101(a)(20). Paragraph (a)(3)(iii) narrows the definition of "foreign national" by excluding both citizens of the United States and, in keeping with BCRA, United States nationals pursuant to 8 U.S.C. 1101(a)(22).[5] The final rule is the same as the language in proposed 11 CFR 110.20(i). No comments addressing this definition were received.

3. 11 CFR 110.20(a)(4) and (a)(5) Definition of "Knowingly"

Both the former and the current foreign national prohibitions in 2 U.S.C. 441e are silent as to what degree of knowledge, if any, a person soliciting, accepting or receiving a contribution or donation must have regarding the foreign national status of the contributor or donor to establish a violation of the statute. In contrast, some other prohibitions in

[5] "National of the United States" is defined as "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. 1101(a)(22). The addition of (B) covers residents of American Samoa.

FECA and BCRA expressly provide that knowledge is an element of the violation.[6]

The Commission in recent years has addressed the issue of required knowledge in a number of enforcement matters arising under former 2 U.S.C. 441e(a). See, for example, Matter Under Review ("MUR") 4530, et al. In this and related matters, the Commission confronted questions of whether the statute or the First Amendment requires a person to have knowledge of a contributor or donor's foreign national status in order to be in violation of the foreign-national prohibition, and, if so, what degree of knowledge is required.

The Commission considered, for example, whether actual knowledge at the time of a solicitation or receipt is a prerequisite for a violation, or whether the person has a duty of inquiry when circumstances would raise the suspicions of an objective observer. Another alternative with regard to the level of knowledge required would be to assume, given the silence in both FECA and BCRA on this question, that Congress intended this to be a strict liability statute. The fact that Congress has used "knowingly" in other provisions of FECA and BCRA, but did not include this standard with regard to the solicitation, acceptance or receipt of foreign national contributions and donations, could be construed as intent not to require knowledge in this regard.

The U.S. Supreme Court has found that "'the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms'." Sutherland Statutory Construction 40:01, quoting Caminetti v. U.S., 242 U.S. 470, 485 (1917).

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[6] E.g., 2 U.S.C. 441a(f) "No candidate or political committee shall knowingly accept any contribution . . . in violation of the provisions of this section . . . ." (Emphasis added).

However, one exception to this "plain meaning rule" is that the rule should not be applied when an injustice would result. Sutherland Statutory Construction 47:25. Based upon its prior enforcement experience with political committees, and, in particular, with the frequent involvement of volunteers in the solicitation and receipt of contributions and donations, the Commission has determined that a knowledge requirement may produce a less harsh result than a strict liability standard.

The final rules at 11 CFR 110.20(a)(4), like the proposed rules, contain three standards types of knowledge, any one of which would satisfy the knowledge requirements: (1) actual knowledge; (2) reason to know; and (3) the equivalent of willful blindness. Additionally, both the proposed rules and the final rules in paragraph (a) contain a list of facts that would lead a reasonable person to conclude that, or inquire as to whether, a contribution or donation was made by a foreign national.

The NPRM sought comments as to whether the additions of a knowledge requirement and of specific standards of knowledge were appropriate and whether there were other potential facts that should be added to those proposed as circumstances that should trigger an inquiry. Further, comments were requested as to whether the regulation should expressly require that recipient candidates, political committees and other organizations actively seek information as to the citizenship of contributors and donors whenever one of the factors listed is at issue.

Several of the commenters opposed a strict liability standard, but supported the inclusion of explicit knowledge requirements in the rules. However, some commenters opposed as too high the standard in proposed paragraph (g)(4)(ii) that would find knowledge when a person was aware of facts that would lead a reasonable person to conclude that there is "a substantial probability" the source of certain funds is a foreign national; one of these commenters suggested that a "preponderance of the evidence" or "more likely than not" standard would be more appropriate. Divergent views were expressed as to the inclusion of a duty to inquire about the nationality of a donor, with one commenter urging reliance upon current 11 CFR 103.3 rather than upon the addition of an affirmative duty to inquire,[1] and another arguing that a "reasonable inquiry" should include asking "directly" whether or not a donor is a foreign national.

As is also discussed below with regard to new section 110.20(g) and (h), the final rules make knowledge an element of any violation of 2 U.S.C. 441e arising from the solicitation, acceptance or receipt of foreign national contributions and donations, or that results from the substantial provision of assistance in the solicitation, making, acceptance or receipt of such contributions and donations. The final rules at 11 CFR 110.20(a)(4) provide a definition of "knowingly," whereby satisfaction of any one of three standards will establish knowledge for purposes of 11 CFR 110.20(g) and (h). Section 110.20(a)(5) contains a list of facts that would lead a reasonable person to conclude, or inquire as to whether, a contribution or donation was made by a foreign national, as discussed below.

In the final rules, the first standard of knowledge at paragraph (a)(4)(i) is that of

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[1] The Commission's regulations at 11 CFR 103.3(b) require that political committee treasurers examine all contributions received for evidence of illegality. If a contribution presenting genuine questions as to legality is deposited, the treasurer has an affirmative duty to investigate the contribution and use best efforts to determine the legality of the contribution. 11 CFR 103.3(b)(1). If, despite such due diligence, the treasurer is unable to determine the legality of the contribution within 30 days of receipt, the treasurer is required to refund the contribution to the contributor. Id.

actual knowledge of the source of funds solicited, accepted or received. The second standard at paragraph (a)(4)(ii) requires awareness on the part of the person soliciting, accepting or receiving a contribution or donation of certain facts that would lead a reasonable person to conclude that there is a substantial probability that the contribution or donation comes from a foreign source. Substantial probability means that there is a considerable likelihood that the donor is a foreign national. See Black's Law Dictionary, Fifth Edition, 1979, and the Random House Dictionary of the English Language, 1987. This is, in effect, a "reason to know" standard under which a person should have acted as though a fact existed until it could be proven otherwise. See Restatement (Second) of Agency, sec. 9, cmt. d (1958).

The third standard of knowledge at paragraph (a)(4)(iii) is satisfied when the person soliciting, accepting or receiving a contribution or donation is, or becomes aware of, facts that would lead a reasonable person to inquire as to whether the source of the funds solicited, accepted or received is a foreign national. This third standard is in effect willful blindness, which is applicable to situations in which a known fact should have prompted a reasonable inquiry, but did not.

Each of the three paragraphs focus on the source of the funds at issue. The source of funds may or may not be the putative contributor or donor who provides a check or other negotiable instrument to a candidate or committee; rather, the source would be the person or persons who originated the contribution or donation, even if it passed through the hands or accounts of a U.S. citizen or permanent resident.

Paragraph (a)(5) sets forth categories of facts that are intended to be illustrative of the types of information that should lead a recipient to question the origin of a contribution or donation under paragraphs (a)(4)(ii) or (iii). These consist of (i) the use of a foreign passport or passport number; (ii) the provision of a foreign address; (iii) the use of a check or other written instrument drawn on a foreign bank or a wire transfer from a foreign bank; or (iv) contributors or donors who reside abroad. Failure to conduct a reasonable inquiry in the face of any of these facts constitutes evidence of a knowing violation of the Act.

4. 11 CFR 110.20(b) "Indirectly"

BCRA amends 2 U.S.C. 441e by banning foreign national contributions and donations, or express or implied promises to make such contributions or donations, that are made "directly or indirectly." Previously, 2 U.S.C. 441e(a) banned foreign national contributions made directly "or through any other person." The legislative history of BCRA does not reveal whether Congress intended "indirectly" to have a broader meaning than "through any other person," the language used in pre-BCRA 2 U.S.C. 441e(a).

The Commission solicited comments in the NPRM as to whether "indirectly" should be construed to have a broader meaning than "through any other person" and if so, whether the rules should explicitly reflect this interpretation by defining "indirectly." Several of the commenters urged the Commission not to interpret "indirectly" as having a broader meaning, arguing that there is nothing in the legislative history to support such a reading, and that to do so would involve speculation as to Congressional intent.

The NPRM further solicited comments as to whether "indirectly" should be interpreted to cover U.S. subsidiaries of foreign corporations that make non-Federal donations with corporate funds or that have a separate segregated fund that makes Federal contributions. Specifically, the Commission sought comment on whether BCRA's new statutory language prohibits a foreign-controlled U.S. corporation, including a U.S. subsidiary of a foreign corporation, from making corporate donations, or from making Federal contributions from a separate segregated fund, or both.

Numerous comments were received addressing the involvement in elections of U.S. subsidiaries of foreign corporations, all of which strongly urged the Commission not to extend the prohibition on foreign national involvement to the activities of foreign-owned U.S. subsidiaries. The comment submitted by the BCRA sponsors stated that Congress in this legislation did not address "contributions by foreign-owned U.S. corporations, including U.S. subsidiaries of foreign corporations." A number of the other commenters cited the absence, in BCRA and in its legislative history, of express Congressional intent to reach either donations by such corporate entities in state elections, where permitted by state law, or the involvement of their separate segregated funds in Federal elections. They stressed the significance of such silence given the series of Commission advisory opinions over more than two decades that have affirmed the participation of such subsidiaries in elections in the United States, either directly in states where state law permits, or through separate segregated funds with regard to Federal elections, so long as there is no involvement of foreign nationals in decisions regarding such participation and so long as foreign nationals are not solicited for the funds to be used. See Advisory Opinions 2000-17, 1999-28, 1995-15, 1992-16, 1992-07, 1990-08, 1989-29, 1982-34, 1981-36, 1980-100, and 1978-21. Several commenters asserted further that the impetus for Congress to amend 2 U.S.C. 441e in 2002 was the involvement of individual foreign nationals in the financing of the 1996 presidential election campaign, not the activities of foreign-owned U.S. subsidiaries.

A number of commenters argued that the use of "indirectly" in BCRA with regard to foreign national contributions and donations represented only a codification of the Commission's earlier use of this word in advisory opinions and regulations to prohibit the direct or indirect involvement of individual foreign nationals in decisions concerning either corporate donations at the State or local level or Federal contributions made by separate segregated funds. See Advisory Opinions 2000-17, 1995-15, 1992-16, 1990-08, and 1989-29 and 11 CFR 110.4(a)(3). A joint comment stressed that Congress had earlier addressed and rejected a ban on U.S. subsidiary participation, the House of Representatives in 1998 and the Senate earlier in 1992, and that this legislative history showed that the use of "indirectly" in BCRA addresses only foreign national involvement in corporate decision-making.[8] These comments, plus one received from two members of

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[8] These legislative references are to the histories of the Congressional Campaign Spending Limit and Election Reform Act of 1992, which was vetoed by the President, and of the Bipartisan Campaign Reform Act, H.R. 2183, when it was considered by the House of Representatives in 1998. In 1992, Senator Bentsen offered an amendment to prohibit federal contributions by the separate segregated funds of U.S. subsidiaries when such a subsidiary is more than 50% owned or controlled by a foreign corporation. The amendment would have changed the definition of "foreign national" to include 50% owned or controlled subsidiaries, and would also have applied the foreign national prohibition to the separate segregated funds of such subsidiaries.

In response, Senator Breaux offered a substitute amendment that would have codified (1) the right of U.S. subsidiary employees to participate in elections through separate segregated funds and (2) the prohibition in the Commission's regulations against the participation of foreign nationals, "directly or indirectly," in decision-making regarding contributions or expenditures made in connection with elections at all levels and in the administration of a political committee. The Senate voted to substitute the Breaux the U.S. Senate, argued that, because Congress was thus very familiar with the U.S. subsidiary issue, any Congressional intent to prohibit such activity in the context of BCRA would have been addressed in debate and made explicit in the legislation.

Several commenters questioned the constitutionality of prohibiting U.S. employees of foreign-owned subsidiaries from participation in U.S. elections. They argued that such a ban would discriminate against these employees on the basis of their employers' parent companies. One commenter noted that, by definition, U.S. subsidiaries are U.S. companies. Another asserted that a ban on U.S. subsidiary election-related activity would be counter to the globalization of financial activity; yet another argued that it would be counter to NAFTA and other treaties. One commenter noted possible negative effects upon U.S. trade associations if certain of their member corporations could not form separate segregated funds.

The Commission agrees with those who have argued that "indirectly" should not be deemed to cover U.S. subsidiaries of foreign corporations. This agreement is based upon the lack of evidence of Congressional intent to broaden the prohibition on foreign national involvement in U.S. elections to cover such entities, and upon the substantial

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amendment. The commenters stressed the use of "indirectly" in the Breaux amendment and argued that its use in BCRA was for the same purpose; i.e., the codification of the regulation prohibiting the participation of foreign nationals in decision-making.

In 1998, the House voted with no opposition for an amendment introduced by Representative Gillmor and Representative Tanner to assure the right of a U.S. subsidiary of a foreign owned or controlled corporation to maintain a separate segregated fund ("SSF"). An amendment proposed by Representative Kaptur to prohibit Federal contributions or expenditures by such SSFs was later modified to address only reporting by U.S. subsidiaries.

policy reasons set forth in the long line of Commission advisory opinions that have permitted U.S. subsidiaries to administer separate segregated funds and to make corporate donations for State and local elections where they are allowed to do so by state law.

The Commission has determined that the activities of U.S. subsidiaries of foreign corporations is governed by new section 110.20(i), which prohibits involvement of foreign nationals in the decision-making of separate segregated funds, and of corporations that plan to make donations in connection with State and local elections where they are permitted to do so. (See further discussion below.) Thus, the final rules do not define "indirectly" or contain additional rules pertaining to U.S. subsidiaries of foreign corporations.

5. 11 CFR 110.20(b) Addition of "Donation" in the Foreign National Ban

In BCRA, Congress added the "donation" of funds by foreign nationals to the existing ban on contributions by foreign nationals. In 1999, 2000, and 2001 the Commission included in its legislative recommendations to Congress a proposal that 2 U.S.C. 441e be amended to clarify that the statutory prohibition on foreign national contributions extends to State and local elections. The Commission noted, inter alia, that this could be accomplished by changing "contribution" to "donation."

Congress chose to retain "contribution" and to add "donation" in BCRA as a prohibited activity. Congress also revised 2 U.S.C. 441e to delete references to "elections" and "candidates" for "any political office," and substituted the broader phrase "Federal, State, or local election." 2 U.S.C. 441e(a)(1)(A). Through this two-fold approach, Congress left no doubt as to its intention to prohibit foreign national support of candidates and their committees and political organizations and foreign national activities in connection with all Federal, State, and local elections.

The legislative history indicates that the revision to 2 U.S.C. 441e "prohibits foreign nationals from making any contribution to a committee of a political party or any contribution in connection with Federal, State or local elections, including any electioneering communications. This clarifies that the ban on contributions [by] foreign nationals applies to soft money donations." Statement of Sen. Feingold, 148 Cong. Rec. S1991-1997 (daily ed. Mar. 18, 2002). The NPRM proposed a definition of "election," based to some extent on the definition in 11 CFR 100.2, which drew no comments. This proposed definition is not included in the final rules. Instead, the wording of new 11 CFR 110.20 tracks the statutory language in BCRA.

As discussed above, the definition of "donation" in 11 CFR 300.2(e) applies to paragraph 110.20(b). Under this provision, both contributions and donations by foreign nationals are prohibited.

<u>6. 11 CFR 110.20(c) Contributions and Donations to Committees and Organizations of Political Parties</u>

BCRA expressly extends the prohibition on foreign national contributions and donations to those made to committees of political parties. 2 U.S.C. 441e(a)(1)(B). The particular committees covered include the national party committees; the national congressional campaign committees; all State, district, local, and subordinate committees, including the non-Federal accounts of State, district, and local party committees.

In light of BCRA's addition of "donation" to the statutory language, the proposed rules further extended the foreign national prohibition to organizations of political parties, whether or not they are political committees under the Act and 11 CFR 100.5. Because many party organization activities affect Federal, State, and local elections, this extension to all party organizations reinforces the prohibition at 2 U.S.C. 441e(a)(1)(A) on foreign national contributions and donations in connection with elections at all levels. Two commenters on the proposed rules agreed with this interpretation, and no commenters objected. Because of the interaction between 2 U.S.C. 441e(a)(1)(A) and (B), the final rule at 11 CFR 110.20(c) adopts this extension to all political party organizations.

7. 11 CFR 110.20(d) Contributions and Donations to Building Funds

BCRA prohibits foreign nationals from making any contribution or donation to national party committees, including donations for the purchase or construction of an office building. See 2 U.S.C. 441e. In addition, new 11 CFR 300.35(a) explicitly provides that the prohibitions in BCRA against contributions and donations by foreign nationals do not permit party committees to spend funds contributed or donated by foreign nationals for the purchase or construction of State or local party committee office buildings. Final Rule and Explanation and Justification, 67 FR 49,101, 49,127 (July 29, 2002). The Explanation and Justification for 11 CFR 300.35 indicates that this prohibition on foreign national funding also extends to in-kind contributions or donations.

Consistent with new 11 CFR 300.35(a), new 11 CFR 110.20(d) explicitly states that foreign nationals are prohibited from making contributions or donations directly or indirectly to committees or organizations of a political party for the construction or purchase of any office building. This final rule is identical to the language in proposed section 110.20(f). The only two commenters who addressed this topic agreed with this addition to the regulations.

8. 11 CFR 110.20(e) and (f) Expenditures, Independent Expenditures, and Disbursements

BCRA prohibits a foreign national from making "an expenditure, independent expenditure, or disbursement for an electioneering communication." 2 U.S.C. 441e(a)(1)(C). The Commission in the NPRM interpreted the prohibitions against an "expenditure" or an "independent expenditure" by a foreign national as being general in scope, and the phrase "for an electioneering communication" at 2 U.S.C. 441e(a)(1)(C) as modifying only "disbursement." This interpretation is based upon the fact that BCRA expressly exempts from the definition of "electioneering communication" "a communication which constitutes an expenditure or an independent expenditure under this Act . . . ." 2 U.S.C. 434(f)(3)(B)(ii).[9] This exemption apparently left "disbursement" as the sole transaction category applicable to electioneering communications. Several commenters agreed with this interpretation. The final rule at paragraph 110.20(f)

[9] BCRA defines "electioneering communication" as a "broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office," that is made within particular time frames, and that is targeted to the relevant electorate if it refers to a candidate other than those for the office of President or Vice-President. 2 U.S.C. 434(f)(3)(A)(i)(I). For a more extensive discussion of electioneering communications, see the Final Rules on "Electioneering Communications," 67 FR 65190 (Oct. 23, 2002).

specifically prohibits disbursements for electioneering communications by foreign nationals.

Section 431(9)(A)(1) of FECA defines "expenditure" as "any purchase, payment, . . . or anything of value made for the purpose of influencing any election for Federal office," and 2 U.S.C. 431(17) defines "independent expenditure" as "an expenditure by a person expressly advocating the election or defeat of a clearly defined candidate which is made without cooperation or consultation with any candidate . . . ." Thus, the terms "expenditure" and "independent expenditure" apply only to amounts spent with respect to Federal elections. In contrast, "disbursement," a term used in both FECA and BCRA but not defined in the statutes, is defined in 11 CFR 300.2 as "any purchase or payment made by any person that is subject to the Act." As discussed above, this definition of "disbursement" covers payments beyond those that constitute "expenditures," and "independent expenditures," such as those made in connection with non-Federal elections.

BCRA does not contain an express prohibition against foreign national disbursements for activities other than electioneering communications. This omission left in question the status of disbursements by foreign nationals in connection with State and local elections that are by definition not "expenditures" or "independent expenditures" because they are not made in connection with Federal elections. The Commission's treatment of a similar issue in the past has, however, provided guidance on this question.

Previously, 2 U.S.C. 441e contained no express prohibition against expenditures by foreign nationals. Nevertheless, the Commission revised 11 CFR 110.4(a) in 1989 to state that foreign nationals were prohibited from making expenditures as well as contributions. The Explanation and Justification for that amendment stated: "The FECA generally prohibits expenditures when it prohibits contributions by a specific category [of] persons, thereby ensuring that the persons cannot accomplish indirectly what they are prohibited from doing directly." 54 FR 4858 (Nov. 24, 1989). The Explanation and Justification continued: "Nothing in Section 441e's legislative history suggests that Congress intended to deviate from the FECA's general pattern of treating contributions and expenditures in parallel fashion." Id.

As discussed above, BCRA added "donations" to the activities prohibited to foreign nationals, this being one way in which the reach of the statute is extended to State and local elections to which the term "contributions" does not apply. As was the case earlier with the FECA, there is nothing in BCRA that would indicate an intent on the part of Congress to treat disbursements for State or local elections any differently than it now treats expenditures for Federal elections, or any intent to not consider donations and disbursements to be parallel concepts. The addition of "disbursements" also serves to strengthen even more the ban on foreign money.

The proposed rule treated "donations" and "disbursements" in the same fashion as "contributions" and "expenditures" have been addressed in the past, by prohibiting at proposed paragraph (d) all disbursements for elections by foreign nationals, not just the disbursements made for electioneering communications that were explicitly prohibited at proposed 11 CFR 110.20(c). Three commenters affirmed the Commission's approach. No commenters were opposed.

Consequently, while the final rule at section 110.20(f) prohibits any disbursement for an electioneering communication by foreign nationals, the final rule at paragraph (g) prohibits all expenditures, independent expenditures, and disbursements by foreign nationals in connection with Federal, State and local elections for the reasons stated above.

9. 11 CFR 110.20(g) Solicitation, Acceptance or Receipt of Contributions and Donations from Foreign Nationals

BCRA prohibits any person from soliciting, accepting, or receiving from a foreign national a contribution or donation made in connection with a Federal, State, or local election, or made to a party committee. 2 U.S.C. 441e(a)(2). Proposed section 110.20(g)(1) sought to prohibit the knowing solicitation, acceptance or receipt of contributions or donations from foreign nationals. As noted above, the final rule at section 110.20(g) contains the same prohibition.

The Commission's additions of a knowledge requirement and of knowledge standards with regard to the solicitation, acceptance or receipt of foreign national contributions and donations are discussed above in connection with 11 CFR 110.20(a)(5). The Commission in the NPRM also sought comment on whether it should create safe harbors within which political committees would be deemed to have satisfied their duty to investigate contributions or donations in order to confirm that they do not come from foreign sources. One commenter requested that the Commission expressly create such a safe harbor if "reasonable efforts" have been made to follow guidelines in the regulations.

Whether a person has the requisite knowledge under 11 CFR 110.20(a)(4) and whether a contributor or donor is a foreign national are fact-intensive determinations. Given the wide range of factual situations that could arise, and the likelihood that some foreign donors or contributors will take steps to conceal the illegal nature of their actions, it is not possible to craft appropriate safe harbors to safeguard recipient committees who do not and cannot know of the illegality while at the same time holding accountable those who do or should know. Consequently, the final rules do not include a safe harbor provision.

In addition, the NPRM sought comments as to whether the Commission should incorporate into the regulations at 11 CFR 110.20 the definition of "solicit" at 11 CFR 300.2(m), whether it should leave the term undefined, or whether it should give the term a more expansive or a narrower reading in this context. Two of the comments received strongly urged the Commission not to incorporate the definition of "solicit" at 11 CFR 300.2(m), deeming it too narrow.

The definition of "solicit" at 11 CFR 300.2(m) applies only to 11 CFR part 300, not to 11 CFR part 110. The final rules in 11 CFR part 110.20 do not include a definition.

<u>10. 11 CFR 110.20(h) Assisting Foreign National Contributions or Donations</u>

The foreign national prohibition at 2 U.S.C. 441e as amended by BCRA also raised issues concerning the liability of persons who knowingly assist foreign nationals in making contributions or donations. The proposed rules included a prohibition on the assisting of foreign national contributions and donations. Section 441e of the Act does not explicitly address those who assist others to violate its prohibition on foreign national contributions, donations, expenditures, independent expenditures, and disbursements. Recently, however, the Commission has addressed in the enforcement context a number of situations in which there arose questions about the liability of individuals who had provided substantial assistance to a foreign national or to a recipient committee with regard to a foreign national contribution or donation. These individuals had functioned as conduits or intermediaries for the funds involved. See MUR 4530, et al. The Commission concluded in these enforcement matters that, because the wording of 2 U.S.C. 441e at the time prohibited foreign nationals from making contributions directly or through any other person, and because the statute also prohibited persons from soliciting, accepting or receiving such contributions from a foreign national, the activities of conduits and intermediaries of foreign national funds were prohibited when the funds involved had been passed on for the purpose of making contributions. It is also worth noting that, in some instances, the foreign national making a prohibited contribution can easily evade U.S. jurisdiction, while a U.S. citizen serving as a conduit or rendering substantial assistance can be more easily reached.

The Commission has now concluded that, in light of Congressional intent in BCRA to strengthen the foreign money ban, nothing in amended 2 U.S.C. 441e should be construed to alter the Commission's pre-BCRA determinations in this respect. Additionally, the Commission has broad rulemaking authority in 2 U.S.C. 437d(a)(8) to make rules that are "necessary to carry out the provisions of the Act." See also BCRA, Pub. L. 107-155, sec. 402(c). It has determined that a rule that prohibits persons from knowingly providing substantial assistance to foreign nationals to circumvent the FECA is necessary to effectuate one of the key purpose of BCRA, that is, to prevent funds from foreign nationals to influence elections. One commenter expressed agreement with extending the prohibition to those who assist foreign national contributions and donations.

For purposes of paragraphs (h)(1) and (2), "substantial assistance" means active involvement in the solicitation, making, receipt or acceptance of a foreign national contribution or donation with an intent to facilitate successful completion of the transaction. See, e.g., IIT, An International Investment Trust v. Cornfield, 619 F.2d 909, 922, 925-926, (2nd Cir. 1980), citing, inter alia, Rolf v. Blyth, Eastman Dillon & Co., Inc., 570 F.2d 38, 47-48 (2nd Cir.), cert. denied, 438 U.S. 1030 (1978); and U.S. v. Peoni, 100 F.2d 401 (2nd Cir. 1938).[10] "Substantial assistance" does not include strictly ministerial activity undertaken pursuant to the instructions of an employer, manager or supervisor.

The final rule at paragraph (h)(1) combines proposed paragraphs (h)(3) and (4) by prohibiting any person from knowingly providing substantial assistance in the solicitation, making, receipt, or acceptance of a contribution or donation from a foreign national. This provision covers, but is not limited to, those persons who act as conduits or intermediaries for foreign national contributions or donations and who thus would also violate the statutory prohibition against receiving contributions or donations from a foreign national. The final rule at paragraph (h)(2) ~~also~~ extends the prohibition on knowingly providing substantial assistance to assisting foreign nationals in the making of

[10] As stated in IIT, Judge Learned Hand observed in Peoni, a criminal case involving possession of counterfeit money, that for centuries courts had required that an accessory to an activity be a person who must 'in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed. All the words used [by courts] . . . carry an implication of purposive attitude towards it." 100 F.2d at 402.

expenditures, independent expenditures and disbursements in connection with Federal or non-Federal elections.

The three standards of knowledge set forth at section 110.20(a)(5) are applicable to anyone who provides the kinds of assistance prohibited by paragraph (h).

11. 11 CFR 110.2(i) Prohibition on Participation by Foreign Nationals in Decisions Related to Election Activities

Section 110.20(i) retains the prohibition at former 11 CFR 110.4(a)(3) on participation by foreign nationals in decisions made by any person, including entities such as corporations, labor organizations or political committees, that are related to Federal and non-Federal elections. The only changes involve the addition of "political organization" to the listing of decision-making entities and of "donations" and "disbursements" to the list of transactions about which decisions are made; all of these additions are needed to address fully the prohibition on the funding of State and local elections. Foreign nationals are prohibited from taking part in decisions about contributions and donations to any Federal, State, or local candidates or to, or by, any political committees or political organizations, and in decisions about expenditures made in support of, or in opposition to, such candidates, political committees or political organizations. Foreign nationals also are prohibited from involvement in the management of a political committee, including a separate segregated fund, a non-connected committee or the non-Federal accounts of these committees.

Numerous comments received regarding the proposed rules supported this provision as the appropriate way to prevent foreign nationals from engaging in election-related activities, particularly in the context of U.S. subsidiaries of foreign-owned corporations. No commenter opposed the proposed regulation.

12. Donations to Presidential Inaugural Committees

In the NPRM the Commission proposed to include a BCRA-related rule prohibiting knowing acceptance by Presidential inaugural committees of donations from foreign nationals. Proposed 11 CFR 110.20(c), 67 FR at 54,379. The Commission had stated in the NPRM entitled "Disclaimers, Fraudulent Solicitations, Civil Penalties, and Personal Use of Campaign Funds," that it would address rules pertaining to inaugural committees in a future rulemaking. 67 FR 55, 348 (Aug. 29, 2002). The Commission has determined that the rules concerning inaugural committees should be addressed in a comprehensive manner. Therefore, donations by foreign nationals to Presidential inaugural committees will also be part of this future rulemaking and are not included in these final rules.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The Commission certifies that the attached final rules do not have a significant economic impact on a substantial number of small entities. The entities affected by these rules are political committees, minors, foreign nationals and U.S. nationals. The basis of this certification is that the national, State, and local party committees of the two major political parties are not small entities under 5 U.S.C. 601 because they are not small businesses, small organizations, or small governmental jurisdictions.

Minors and many foreign nationals are individuals, and therefore, not small entities. Furthermore, the final rules, which are based on statutory language, clarify and describe in further detail the already existing ban on contributions by foreign nationals. Additionally, to the extent that there may be foreign nationals that may fall within the definition of "small entities," their numbers are not substantial, particularly the number that would make a donation, expenditure, independent expenditure, or disbursement in connection with a Federal, State, or local election.

In addition, to the extent that the rules apply to any small entities, they are not unduly burdened by the increased contribution limitations, which give such small entities more latitude in the amount they contribute. Furthermore, the new rules for redesignating contributions for a particular election and reattributing contributions to particular donors provide political committees with flexibility and additional means to ensure compliance with FECA and BCRA, thereby reducing any economic costs they may have incurred under the previous rules.

List of Subjects in

11 CFR Part 102

Political committees and parties, reporting and recordkeeping requirements.

11 CFR Part 110

Campaign funds, Political committees and parties.

For the reasons set out in the preamble, Subchapter A of Chapter I of title 11 of the Code of Federal Regulations is amended as follows:

PART 102 – REGISTRATION, ORGANIZATION, AND RECORDKEEPING BY POLITICAL COMMITTEES (2 U.S.C. 433)

1. The authority citation for part 102 continues to read as follows:

Authority: 2 U.S.C. 432, 433, 434(a)(11), 438(a)(8), 441d.

2. Section 102.9 is amended by adding paragraph (a)(4) and revising paragraph (e) to read as follows:

§ 102.9 Accounting for contributions and expenditures (2 U.S.C. 432(c)).

* * * * *

(a) * * *

(4) In addition to the account to be kept under paragraph (a)(1) of this section, for contributions in excess of $50, the treasurer of a political committee or an agent authorized by the treasurer shall maintain:

(i) A full-size photocopy of each check or written instrument; or

(ii) A digital image of each check or written instrument. The political committee or other person shall provide the computer equipment and software needed to retrieve and read the digital images, if necessary, at no cost to the Commission.

* * * * *

(e) If the candidate, or his or her authorized committee(s), receives contributions that are designated for use in connection with the general election pursuant to 11 CFR 110.1(b) prior to the date of the primary election, such candidate or such committee(s) shall use an acceptable accounting method to distinguish between contributions received for the primary election and contributions received for the general election. If a candidate is not a candidate in the general election, any contributions made for the general election shall be refunded to the contributors, redesignated in accordance with 11 CFR 110.1(b)(5) or 110.2(b)(5), or reattributed in accordance with 11 CFR 110.1(k)(3), as appropriate. Acceptable accounting methods include, but are not limited to:

(1) The designation of separate accounts for each election, caucus or convention, or

(2) The establishment of separate books and records for each election.

~~If a candidate is not a candidate in the general election, any contributions made for the general election shall be refunded to the contributors, redesignated in accordance with 11 CFR 110.1(b)(5) or 110.2(b)(5), or reattributed in accordance with 11 CFR 110.1(k)(3), as appropriate.~~

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PART 110 – CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS

3. The authority citation for part 110 is revised to read as follows:

Authority: 2 U.S.C. 431(8), 431(9), 432(c)(2), 432d(a)(8), 441a, 441b, 441d, 441e, 441f, 441g, 441h and 441k.

4. Section 110.1 is amended by revising paragraphs (a), (b)(1), (b)(5)(ii), (c)(1), (i), (k)(3)(ii), (l)(4), and (l)(5) to read as follows:

§ 110.1 Contributions by persons other than multicandidate political committees (2 U.S.C. 441a(a)(1)).

(a) Scope. This section applies to all contributions made by any person as defined in 11 CFR 100.10, except multicandidate political committees as defined in 11 CFR 100.5(e)(3) or entities and individuals prohibited from making contributions under 11 CFR ~~110.4~~ 110.19 and 110.20 and 11 CFR parts 114 and 115.

(b) * * *

(1) No person shall make contributions to any candidate, his or her authorized political committees or agents with respect to any election for Federal office ~~which~~ that, in the aggregate, exceed ~~$1,000~~ $2,000.

(i) The contribution limitation in the introductory text of paragraph (b)(1) of this section shall be increased by the percent difference in the price index in accordance with 11 CFR 110.17.

(ii) The increased contribution limitation shall be in effect for the 2-year period beginning on the first day following the date of the last general election in the year preceding the year in which the contribution limitation is increased and ending on the date of the next general election. For example, an increase in the contribution limitation made in January 2005 is effective from November 3, 2004 to November 7, 2006.

(iii) In every odd numbered year, the Commission will publish in the Federal Register the amount of the contribution limitation in effect and place such information on the Commission's web site.

* * * * *

(3) * * *

(iii) The amount of the net debts outstanding shall be adjusted as additional funds are received and expenditures are made. The candidate and his or her authorized political committee(s) may accept contributions made after the date of the election if:

(A) Such contributions are designated in writing by the contributor for that election;

(B) Such contributions do not exceed the adjusted amount of net debts outstanding on the date the contribution is received; and

(C) Such contributions do not exceed the contribution limitations in effect on the date of such election.

* * * * *

(5) * * *

(ii) (A) A contribution shall be considered to be redesignated for another election if –

(1) The treasurer of the recipient authorized political committee requests that the contributor provide a written redesignation of the contribution and informs the contributor that the contributor may request the refund of the contribution as an alternative to providing a written redesignation; and

(2) Within sixty days from the date of the treasurer's receipt of the contribution, the contributor provides the treasurer with a written redesignation of the contribution for another election, which is signed by the contributor.

<u>(B) Notwithstanding paragraph (b)(5)(ii)(A) of this section or any other provision of this section, the treasurer of the recipient authorized political committee may treat all or part of the amount of the contribution that exceeds the contribution limits in paragraph (b)(1) of this section as made with respect to the general election, provided that:</u>

<u>(1) The contribution was made before the primary election;</u>

<u>(2) The contribution was not designated for a particular election;</u>

<u>(3) The contribution would exceed the limitation on contributions set forth in paragraph (b)(1) of this section if it were treated as a contribution made for the primary election;</u>

<u>(4) Such redesignation would not cause the contributor to exceed any of the limitations on contributions set forth in paragraph (b)(1) of this section;</u>

<u>(5) The treasurer of the recipient authorized political</u>

committee notifies the contributor of the amount of the contribution that was redesignated and that the contributor may request a refund of the contribution; and

(6) Within thirty days from the date of the treasurer's receipt of the contribution, the treasurer shall provide notification required in paragraph (b)(5)(ii)(B)(5) of this section to the contributor by any written method including electronic mail.

(C) Notwithstanding paragraph (b)(5)(ii)(A) of this section or any other provision of this section, the treasurer of the recipient authorized political committee may treat all or part of the amount of the contribution that exceeds the contribution limits in paragraph (b)(1) of this section as made with respect to the primary election, provided that:

(1) The contribution was made after the primary election but before the general election;

(2) The contribution was not designated for a particular election;

(3) The contribution would exceed the limitation on contributions set forth in paragraph (b)(1) of this section if it were treated as a contribution made for the general election;

(4) Such redesignation would not cause the contributor to exceed any of the limitations on contributions set forth in paragraph (b)(1) of this section;

(5) The contribution does not exceed the committee's net debts outstanding for the primary election;

(6) The treasurer of the recipient authorized political committee notifies the contributor of how the contribution was redesignated and that the contributor may request a refund of the contribution; and

(7) Within thirty days from the date of the treasurer's receipt of the contribution, the treasurer shall provide notification required in paragraph (b)(5)(ii)(C)(6) of this section to the contributor by any written method, including electronic mail.

* * * * *

(c) * * *

(1) No person shall make contributions to the political committees established and maintained by a national political party in any calendar year~~, which~~ that in the aggregate exceed ~~$20,000~~ $25,000.

(i) The contribution limitation in paragraph (c)(1) of this section shall be increased by the percent difference in the price index in accordance with 11 CFR 110.17.

(ii) The increased contribution limitation shall be in effect for the 2-year period beginning on the first day following the date of the last general election in the year preceding the year in which the contribution limitation is increased and ending on the date of the next general election. For example, an increase in the contribution limitation made in January 2005 is effective from November 3, 2004 to November 7, 2006.

(iii) In every odd-numbered year, the Commission will publish in the Federal Register the amount of the contribution limitation in effect and place such information on the Commission's web site.

* * * * *

(i) Contributions by spouses ~~and minors. (1)~~ The limitations on contributions of this section shall apply separately to contributions made by each spouse even if only one spouse has income.

~~(2) Minor children (children under 18 years of age) may make contributions to any candidate or political committee which in the aggregate do not exceed the limitations on contributions of this section, if—~~

~~(i) The decision to contribute is made knowingly and voluntarily by the minor child;~~

~~(ii) The funds, goods, or services contributed are owned or controlled exclusively by the minor child, such as income earned by the child, the proceeds of a trust for which the child is the beneficiary, or a savings account opened and~~

~~maintained exclusively in the child's name; and~~

(iii) ~~The contribution is not made from the proceeds of a gift, the purpose of which was to provide funds to be contributed, or is not in any other way controlled by another individual.~~

* * * * *

(k) * * *

(3) * * *

(ii) (A) A contribution shall be considered to be reattributed to another contributor if –

(1) The treasurer of the recipient authorized political committee asks the contributor whether the contribution is intended to be a joint contribution by more than one person, and informs the contributor that he or she may request the return of the excessive portion of the contribution if it is not intended to be a joint contribution; and

(2) Within sixty days from the date of the treasurer's receipt of the contribution, the contributor provides the treasurer with a written reattribution of the contribution, which is signed by each contributor, and which indicates the amount to be attributed to each contributor if equal attribution is not intended.

(B) (1) <u>Notwithstanding paragraph (k)(3)(ii)(A) of this section or any other provision of this section, any excessive portion of a contribution described in paragraph (k)(3)(i) of this section that was made by a written instrument that is imprinted with the names of more than one individual may be attributed among the individuals listed unless a different instruction is on the instrument or in a separate writing signed by the contributor(s), provided that such attribution would notcause any contributor to exceed any of the limitations on contributions set forth in paragraph (b)(1) of this section.</u>

<u>(2) The treasurer of the recipient authorized political committee shall notify each contributor of how the contribution was attributed and that the contributor may request the refund of the excessive portion of the contribution if it is not intended to be a joint contribution. The notice shall inform the contributors that each must have an ownership interest in the funds in the account, or the reattribution will constitute a contribution in the name of another in violation of 2 U.S.C. 441f.</u>

(3) Within thirty days from the date of the treasurer's receipt of the contribution, the treasurer shall provide such notification to each account holder by any written method, including electronic mail.

(l) * * *

(4) (i) If a political committee chooses to rely on a postmark as evidence of the date on which a contribution was made, the treasurer shall retain the envelope or a copy of the envelope containing the postmark and other identifying information; and

(ii) If a political committee chooses to rely on the redesignation presumption in 11 CFR 110.1(b)(5)(ii)(B) or (C) or the reattribution presumption in 11 CFR 110.1(k)(3)(ii)(B), the treasurer shall retain a full-size photocopy of the check or written instrument, of any signed writings that accompanied the contribution, and of the notices sent to the contributors as required by 11 CFR 110.1(b)(5)(ii)(B) and (k)(2)(ii)(B).

(5) If a political committee does not retain the written records concerning designation required under 11 CFR 110.1(l)(1), the contribution shall not be considered designated in writing for a particular election, and the provisions of 11 CFR 110.1(b)(2)(ii) or 11 CFR 110.2(b)(2)(ii) shall apply. If a political committee does not retain the written records concerning redesignation or reattribution required under 11 CFR 110.1(l)(2), (3), (4)(ii) or (6), including the contributor notices, the

redesignation or reattribution shall not be effective, and the original designation or attribution shall control.

* * * * *

5. Section 110.2 is amended by revising paragraph (e) to read as follows:

§ 110.2 Contributions by multicandidate political committees (2 U.S.C. 441a(a)(2)).

* * * * *

(e) Contributions by political party committees to Senatorial candidates.

(1) Notwithstanding any other provision of the Act, or of these regulations, the Republican and Democratic Senatorial campaign committees, or the national committee of a political party, may make contributions of not more than a combined total of ~~$17,500~~ $35,000 to a candidate for nomination or election to the Senate during the calendar year of the election for which he or she is a candidate. Any contribution made by such committee to a Senatorial candidate under this paragraph in a year other than the calendar year in which the election is held shall be considered to be made during the calendar year in which the election is held.

(2) The contribution limitation in paragraph (e)(1) of this section shall be increased by the percent difference in the price index in accordance with 11 CFR 110.17. The increased contribution limitation shall be in effect for the 2-year period beginning on the first day following the date of the last general election in the year preceding the year in which the amount is increased and ending on the date of the next general election. For example, an increase in the contribution limitation made in January 2005 is effective

from November 3, 2004 to November 7, 2006. In every odd-numbered year, the Commission will publish in the Federal Register the amount of the contribution limitation in effect and place such information on the Commission's web site.

* * * * *

6. Section 110.4 is amended by revising the section heading and by removing and reserving paragraph (a) to read as follows.

§ 110.4 Contributions in the name of another; cash contributions (2 U.S.C. 441f, 441g, 432(c)(2)).

(a) [Remove and reserve].

* * * * *

7. Section 110.5 is amended by revising the section heading and paragraphs (a), (b), (d) and (e) to read as follows:

§ 110.5 ~~Annual~~ Aggregate bi-annual contribution limitation for individuals (2 U.S.C. 441a(a)(3)).

(a) Scope. This section applies to all contributions made by any individual, except individuals prohibited from making contributions under 11 CFR ~~110.4~~ 110.19 and 110.20 and 11 CFR part 115.

(b) ~~Annual~~ Bi-annual limitations.

(1) In the two-year period described in paragraph (b)(3) of this section, no individual shall make contributions ~~in any calendar year which aggregate more $25,000~~ aggregating more than $95,000, including no more than:

(i) $37,500 in the case of contributions to candidates and the authorized committees of candidates; and

(ii) $57,500 in the case of any other contributions, of which not more than $37,500 may be attributable to contributions to political committees that are not political committees of any national political parties.

(2) Contributions to candidates made under the increased contribution limitations under 11 CFR part 400, during periods in which such candidates may accept such contributions, are not subject to the contribution limitations of paragraph (b)(1) of this section.

(3) The contribution limitations in paragraph (b)(1) of this section shall be increased by the percent difference in the price index in accordance with 11 CFR 110.17. The increased contribution limitations shall be in effect for the 2-year period beginning on the first day following the date of the last general election in the year preceding the year in which the contribution limitations are increased and ending on the date of the next general election.

(4) The contributions subject to the contribution limitations in paragraph (b)(1) of this section must be aggregated within the same time period as described in paragraph (b)(3) of this section. For example, the increase in the contribution limitations made in January 2005 are effective from November 3, 2004 to November 7, 2006, and contributions must be aggregated from November 3, 2004 to November 7, 2006.

(5) In every odd-numbered year, the Commission will publish in the Federal Register the amount of the contribution limitations in effect and place such information on the Commission's web site.

* * * * *

(d) Independent expenditures. The ~~annual~~ bi-annual limitation on contributions in this section applies to contributions made to persons, including political committees, making independent expenditures under 11 CFR part 109.

(e) Contributions to delegates and delegate committees. The ~~annual~~ bi-annual limitation on contributions in this section applies to contributions to delegate and delegate committees under 11 CFR 110.14.

8. Section 110.9 is revised to read as follows:

§ 110.9 ~~Miscellaneous provisions~~ Violation of limitations.

~~(a) Violation of limitations.~~ No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of 11 CFR part 110. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under this part 110.

~~(b) Fraudulent misrepresentation. No person who is a candidate for Federal office or an employee or agent of such a candidate shall—~~

~~(1) Fraudulently misrepresent himself or any committee or organization under his control as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or~~

~~employee or agent thereof on a matter which is damaging to such other candidate or political party or employee or agent thereof; or~~

~~(2) Willfully and knowingly participate in or conspire to participate in any plan or design to violate paragraph (b)(1) of this section.~~

~~(c) Price index increase.~~

~~(1) Each limitation established by § 110.7 and § 110.8 shall be increased by the annual percent difference of the price index, as certified to the Commission by the Secretary of Labor. Each amount so increased shall be the amount in effect for that calendar year.~~

~~(2) For purposes of paragraph (c)(1) of this section, the term price index means the average over a calendar year of the Consumer Price Index (all items - United States city average) published monthly by the Bureau of Labor Statistics.~~

~~(d) Voting age population. The Commission shall assure that there is annually published in the Federal Register an estimate of the voting age population based on an estimate of the voting age population of the United States, of each State, and of each congressional district. The term voting age population means resident population, 18 years of age or older.~~

9. Sections 110.15 and 110.16 are added and reserved.

10. Section 110.17 is added to read as follows:

§ 110.17 Price Index increase.

(a) Price index increases for party committee expenditure limitations and Presidential candidate expenditure limitations. The limitations on expenditures established by 11 CFR 110.7 and 110.8 shall be increased by the percent difference between the price index, as certified to the Commission by the Secretary of Labor, for the 12 months preceding the beginning of the calendar year and the price index for the base period.

(1) Each expenditure limitation so increased shall be the expenditure limitation in effect for that calendar year.

(2) For purposes of this paragraph (a), the term base period means calendar year 1974.

(b) Price index increases for contributions by persons, by political party committees to Senatorial candidates, and the bi-annual aggregate contribution limitation for individuals. The limitations on contributions established by 11 CFR 110.1(b) and (c), 110.2(e), and 110.5, shall be increased only in odd-numbered years by the percent difference between the price index, as certified to the Commission by the Secretary of Labor, for the 12 months preceding the beginning of the calendar year and the price index for the base period.

(1) The increased contribution limitations shall be in effect for the 2-year period beginning on the first day following the date of the last general election in the year preceding the year in which the contribution limitations are increased and ending on the date of the next general election. For example, increases in the contribution limitations made in January 2005 are effective from November 3, 2004 to November 7, 2006.

(2) For purposes of this paragraph (b) the term base period means calendar year 2001.

(c) Rounding of price index increases. If any amount after the increases under paragraph (a) or (b) of this section is not a multiple of $100, such amount shall be rounded to the nearest multiple of $100.

(d) Definition of price index. For purposes of this section, the term price index means the average over a calendar year of the Consumer Price Index (all items—United States city average) published monthly by the Bureau of Labor Statistics.

(e) Publication of price index increases. In every odd-numbered year, the Commission will publish in the Federal Register the amount of the expenditure and contribution limitations in effect and place such information on the Commission's web site.

11. Section 110.18 is added and reserved.

12. Section 110.19 is added to read as follows:

§ 110.19 Contributions and donations by minors.

(a) Contributions to candidates. Except as provided in paragraph (c) of this section, an individual who is 17 years old or younger shall not make a contribution to a candidate for Federal office, including a contribution to any of the following:

(1) A principal campaign committee designated pursuant to 11 CFR 101.1(a);

(2) Any other political committee authorized by a candidate under 11 CFR 101.1(b) and 102.13 to receive contributions or make expenditures on behalf of such candidate; or

(3) Any entity directly or indirectly established, financed, maintained or controlled by one or more Federal candidates.

(b) Contributions and donations to committees of political parties. Except as provided in paragraph (c) of this section, an individual who is 17 years old or younger shall not make a contribution or donation to:

(1) A national, State, district or local committee of a political party, including a national congressional campaign committee;

(2) Any entity directly or indirectly established, financed, maintained or controlled by a national, State, district or local committee of a political party, including a national congressional campaign committee; or

(3) Any account of a committee or entity described in paragraphs (b)(1) and (b)(2) of this section.

(c) Contributions and donations by minors for runoffs, recounts and election contests resulting from elections held before November 6, 2002. The prohibitions of paragraphs (a) and (b) of this section shall not apply to contributions and donations made by individuals who are 17 years old or younger with respect to runoff elections, recounts or election contests resulting from elections held prior to November 6, 2002. Contributions made with respect to runoff elections shall be subject to the conditions set forth in paragraphs (d)(1) through (d)(3) of this section.

(d) Contributions to political committees that are not authorized committees or committees of political parties. An individual who is 17 years old or younger may make contributions to a political committee not described in paragraphs (a) or (b) or this section that in the aggregate do not exceed the limitations on contributions of 11 CFR 110.1 and 110.5, if--

(1) The decision to contribute is made knowingly and voluntarily by that individual;

(2) The funds, goods, or services contributed are owned or controlled exclusively by that individual, such as income earned by that individual, the proceeds of a trust for which that individual is the beneficiary, or a savings account opened and maintained exclusively in that individual's name;

(3) The contribution is not made from the proceeds of a gift, the purpose of which was to provide funds to be contributed, or is not in any other way controlled by another individual; and

(4) The contribution is not earmarked or otherwise directed to one or more Federal candidates, authorized committees, political party committees, or other organization covered by paragraphs (a) or (b) of this section. See 11 CFR 110.6.

(e) Volunteer Services. Nothing in this section shall prohibit an individual who is 17 years old or younger from providing volunteer services to any Federal candidate or political committee.

(f) Definition of directly or indirectly established, financed, maintained or controlled. Directly or indirectly established, financed, maintained or controlled has the same meaning as in 11 CFR 300.2(c).

13. Section 110.20 is added to read as follows:

§ 110.20 Prohibition on contributions, donations, expenditures, independent expenditure, and disbursements by foreign nationals. (2 U.S.C. 441e).

(a) Definitions. For purposes of this section, the following definitions apply:

(1) Disbursement has the same meaning as in 11 CFR 300.2(d).

(2) Donation has the same meaning as in 11 CFR 300.2(e).

(3) ~~For purposes of this section,~~ Foreign national means–

(i) A foreign principal, as defined in 22 U.S.C. 611(b); or

(ii) An individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence, as defined in 8 U.S.C. 1101(a)(20); however,

(iii) ~~Except that~~ Foreign national shall not include any individual who is a citizen of the United States, or who is a national of the United States as defined in 8 U.S.C. 1101(a)(22).

(4) Knowingly means that a person must:

(i) Have actual knowledge that the source of the funds solicited, accepted or received is a foreign national;

(ii) Be aware of facts that would lead a reasonable person to conclude that there is a substantial probability that the source of the funds solicited, accepted or received is a foreign national; or

(iii) Be aware of facts that would lead a reasonable person to inquire whether the source of the funds solicited, accepted or received is a foreign national, but the person failed to conduct a reasonable inquiry.

(5) For purposes of paragraph (a)(4) of this section, pertinent facts include, but are not limited to:

(i) The contributor or donor uses a foreign passport or passport number for identification purposes;

(ii) The contributor or donor provides a foreign address;

(iii) The contributor or donor makes a contribution or donation by means of a check or other written instrument drawn on a foreign bank or by a wire transfer from a foreign bank; or

(iv) The contributor or donor resides abroad.

~~(1)~~ (b) Contributions and donations by foreign nationals in connection with elections. A foreign national shall not, directly or indirectly, ~~or through any other person~~ make a contribution ~~or an expenditure,~~ or a donation of money or other thing of value, or expressly or impliedly promise to make a contribution or a donation, ~~or an expenditure,~~ in connection with a ~~convention, a caucus, or a primary, general, special , or runoff election~~ any Federal, State, or local election ~~in connection with any local, State or Federal public office~~.

(c) Contributions and donations by foreign nationals to political committees and organizations of political parties. A foreign national shall not, directly or indirectly, make a contribution or donation to:

(1) A political committee of a political party, including a national party committee, a national congressional campaign committee, or a State, district, or local party committee, including a non-Federal account of a State, district or local party committee, or

(2) An organization of a political party whether or not the organization is a political committee under 11 CFR 100.5.

(d) Contributions and donations by foreign nationals for office buildings. A foreign national shall not, directly or indirectly, make a contribution or donation to a committee of a political party for the purchase or construction of an office building. See 11 CFR 300.10 and 300.35.

(e) Disbursements by foreign nationals for electioneering communications. A foreign national shall not, directly or indirectly, make any disbursement for an electioneering communication as defined in 11 CFR 100.29.

(f) Expenditures, independent expenditures, or disbursements by foreign nationals in connection with elections. A foreign national shall not, directly or indirectly, make any expenditure, independent expenditure, or disbursement in connection with any Federal, State, or local election.

(g) Solicitation, acceptance or receipt of contributions and donations from foreign nationals. No person shall knowingly solicit, accept, or receive ~~a contribution as set out above~~ from a foreign national any contribution or donation prohibited by paragraphs (b) through (d) of this section.

(h) Providing substantial assistance.

(1) No person shall knowingly provide substantial assistance in the solicitation, making, acceptance or receipt of a contribution or donation prohibited by paragraphs (b) through (d), and (g) of this section.

(2) No person shall knowingly provide substantial assistance in the making of an expenditure, independent expenditure, or disbursement prohibited by paragraphs (e) and (f) of this section.

(i) Participation by foreign nationals in decisions involving election-related activities. A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, such as a corporation, labor organization, ~~or~~

political committee, or political organization with regard to such person's Federal or non-Federal election-related activities, such as decisions concerning the making of contributions, donations, ~~or~~ expenditures, or disbursements in connection with elections for any Federal, State, or local ~~State, or Federal~~ office or decisions concerning the administration of a political committee.

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David M. Mason
Chairman
Federal Election Commission

DATED: ____________________
BILLING CODE: 6715-01-U